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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

No. 97-

INMATES OF THE SUFFOLK COUNTY JAIL et al.,

Petitioners,

vs.

RICHARD ROUSE, SHERIFF OF SUFFOLK COUNTY et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Firth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in construing the Prison Litigation Reform Act ("PLRA"), 18 U.S.C.A. §3626, to require the termination of an existing consent decree even if doing so created or perpetuated a constitutional violation?

2. Does the PLRA, as construed by the Court of Appeals, violate the separation of powers doctrine and due process of law by nullifying entitlements set forth in a consent decree and by imposing impossible-to-meet requirements to continue the decree?

PARTIES TO THE PROCEEDINGS

Petitioners are the class of inmates of the Suffolk County Jail, in Boston, Massachusetts. The named plaintiffs are Julio Gonzalez, Carlos Manuel Lopez, Stephen Gordon and Rogelio Santiago. Respondents are Richard J. Rouse, Sheriff of Suffolk County, Michael Maloney, Commissioner of Correction for the Commonwealth of Massachusetts, and the United States as intervenor. Inactive defendants are the Mayor of the City of Boston and the City Council of the City of Boston.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Firth Circuit

PETITION FOR WRIT OF CERTIORARI

Inmates of the Suffolk County Jail, on behalf of all members of the class, respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit (App. A) is reported at 129 F.3d 649 (1st Cir. 1997). The opinion (App. C) and order (App. D) of the District Court are reported at 952 F. Supp. 869 (D. Mass. 1997).

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1997. (App. B). Petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 802 of the Prison Litigation Reform Act, 18 U.S.C. §3626(b), provides:

> (2) Immediate termination of prospective relief. -- In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.
>
> (3) Limitation. -- Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

STATEMENT OF THE CASE

Proceedings Leading to the Consent Decree

This petition is the latest chapter following this Court's decision in Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992).[1/] This lawsuit was commenced in 1971 on behalf of the class of inmates of the Suffolk County Jail, a county correctional facility for pretrial detainees, then known as the "Charles Street Jail." The defendants were the Sheriff of Suffolk County, the Mayor and City Councilors of the City of Boston and the Massachusetts Commissioner of Correction. The action arose under 42 U.S.C. §1983 and the basis for federal jurisdiction in the district court was 28 U.S.C. §1343(3) and (4).

In 1973 the district court found that the conditions at the jail violated the detainees' right to due process under the Fourteenth Amendment and found that the violations could not be remedied in the 125 year old building. Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973). The court reviewed the unhealthy, inhumane and dangerous conditions

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[1/] Justice Breyer did not sit on any of the appeals involving motions to modify or vacate the consent decree to allow for double bunking. The only appeal in which Justice Breyer participated was Inmates of the Suffolk County Jail v. Kearney, 928 F.2d 33 (1st Cir. 1991), in which he wrote the opinion affirming the district court's order that the consent decree required the Sheriff to house the female detainees in the new jail.

of confinement, id. at 679-84, focusing particularly on the then-prevailing practice of double celling.[2/] Id. at 679. The court set a deadline to close the jail in three years, id. at 689-91, and permanently enjoined the defendants from double celling the detainees. Id. at 691. No appeal was taken.

By 1978, when virtually no progress had been made on providing a replacement facility, the district court set a firm date for closing the jail. On appeal, the Court of Appeals affirmed, but held that the deadline would be extended if the defendants

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[2/] The court noted:

> Cell size is approximately 8' wide x 11' long x 10' high, and was designed and constructed for single occupancy. . . . It is impossible for two men to occupy one of these cells without regular, inadvertent physical contact, inevitably exacerbating tensions and creating interpersonal frictions.

Id. at 679.

While the case was under advisement, a detainee was murdered in his cell by his cellmate. The court observed that:

> [d]espite the unusual nature of this occurrence, it is evidence of the potential for interpersonal friction inherent in a system of double occupancy of cells. . . .

Id. at 679 n.4.

entered into "enforceable commitments" for a new facility. Inmates of the Suffolk County Jail v. Kearney, 573 F.2d 98, 99-101 (1st Cir. 1978).

This led to the consent decree of May 7, 1979, in which the plaintiffs agreed to further delay, and the defendants agreed to "construct, maintain and operate" a new detention facility according to specific standards contained in the Architectural Program, which was attached to the decree and incorporated by reference. The Architectural Program required single occupancy cells. As the district court later found, this was a significant objective of the consent decree, and the plaintiff class would not have consented to a decree without it. Inmates of the Suffolk County Jail v. Rufo, 148 F.R.D. 14, 20 (D. Mass. 1993). The new jail was to be completed by 1983.

In April of 1985, the district court approved a modification of the consent decree to allow the defendants to increase the capacity of the new jail, provided, however, that "single-cell occupancy is maintained under the design for the facility." (App. 35a-36a). The order was entered without opposition from any party.

Subsequent Proceedings Relevant to the Consent Decree

After extensive further delays, the new jail was finally opened in 1990, with 453 single occupancy cells. Prior to the opening, in July of 1989, the Sheriff moved to modify the provision of the decree requiring single cell occupancy. The motion was grounded on an asserted change in the law based on Bell v. Wolfish, 441 U.S. 520 (1979), and an asserted change in fact, to

wit, an increase in the Suffolk County detainee population. The district court denied the Sheriff's motion on the ground that it did not meet either the "grievous wrong" standard of United States v. Swift, 286 U.S. 106 (1932), or the flexible standard advanced by the Sheriff. Inmates of the Suffolk County Jail v. Kearney, 734 F. Supp. 561 (D. Mass. 1990). Both the Sheriff and the Commissioner appealed. In a per curiam opinion, the First Circuit affirmed the order of the district court. Inmates of the Suffolk County Jail v. Kearney, 915 F.2d 1557 (1st Cir. 1990).

Supreme Court Proceedings

The Sheriff and the Commissioner filed petitions for certiorari, both of which were granted, 498 U.S. 1081 (1991). In Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367 (1992), this Court articulated the standard for adjudication of motions for relief from consent decrees. The Court rejected the Commissioner's claim that he was entitled to be relieved of consent decree obligations not currently required by law, holding that a consent decree is a "final judgment that may be reopened only to the extent that equity requires." Id. at 391. Instead, the Court held, under Fed.R.Civ.P. Rule 60(b)(5), "a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance." Id. at 393. The Court also ruled that the proposed modification must not "create or perpetuate" a constitutional violation. Id. at 391. The Court remanded the case for reconsideration under the announced standard. Id.

The Remand

On remand, the Sheriff moved for modification of the consent decree under Rufo, seeking leave to double bunk in 197 cells. He relied solely on an unanticipated increase in the population. The Commissioner moved to vacate the decree on the ground that the constitutional violations alleged in the complaint no longer existed.

The district court denied both motions. Inmates of the Suffolk County Jail v. Rufo, 148 F.R.D. 14 (D. Mass. 1993). Agreeing that there had been a change in factual circumstance -- an unforeseen increase in the detainee population -- the court concluded that the Sheriff's proposal was flawed as not suitably tailored to fit the changed circumstances. The court noted the centrality of the single occupancy provision to the decree. Id. at 20. It found that a "change in use to double-bunking would substantially increase risks of violence in areas of a cell beyond the view of monitors" and that "the risk of infectious diseases would be exacerbated by double-bunking[,] ... a 'very effective mechanism [for transmission]'" of tuberculosis. Id. at 21. (citation omitted). For that reason, the court denied the motion without prejudice to submission of a plan that "meets the objectives of the consent decree, including protection against abuse and undue risk of contagion." Id. at 24. The court denied the Commissioner's motion to vacate, as a matter of law, because it would require the court to terminate the decree without any consideration of whether the modification is "suitably tailored to changed circumstances." Id. at 23.

The Commissioner appealed and the First Circuit affirmed, holding that the Commissioner had not shown that "it is unlikely that the original violations will soon be resumed if the decree were discontinued." Inmates of the Suffolk County Jail v. Rufo, 12 F.3d 286, 293 (1st Cir. 1993). The court observed:

> we think it obviously apparent that double-celling in very small quarters, with lack of security against assaults and possible other threats (e.g., disease), could violate due process. And it is far from clear on the record before us that the immediate plans proposed by the Sheriff are constitutional, let alone any prospective next steps that might follow from the complete vacation of the consent decree.

Id.

Thereafter, the Sheriff moved again to modify the consent decree, this time seeking to double bunk in 161, instead of 197, cells. As part of his showing, the Sheriff undertook to implement various measures designed to minimize the risks arising from double bunking, including physical renovations to the cells to increase interior visibility and other changes in security and medical screening procedures. Again, the district court held that the Sheriff's revised motion was not tailored to fit the changed circumstances previously found by the court, but concluded that double bunking in 100 cells would be appropriate under Rufo. Inmates of the Suffolk County Jail v. Rufo,

844 F. Supp. 31, 33, 37 (D. Mass. 1994).[3/] The court so modified the decree in June of 1994, and the Sheriff began double bunking in 100 cells.

The Prison Litigation Reform Act

The Prison Litigation Reform Act ("PLRA"), Pub.L. 104-134, §§801-802 (1996), amending 18 U.S.C. §3626, was enacted on April 26, 1996. It provides, in pertinent part:

> (2) Immediate termination of prospective relief. In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief

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[3/] The court found that

> vacating the consent decree -- would almost certainly result in pressure on the Sheriff to double-bunk all cells in the facility, which would create a high risk -- virtually a near certainty, absent any downturn in the number of pretrial detainees -- of unconstitutional overcrowding.

Id. at 35.

The court commented that the pretrial detainee population could increase to the point where the Sheriff "would soon need to consider triple-bunking in order to keep all inmates at Nashua Street."

Id. at 36.

> was approved or granted in the absence of a finding by the Court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C. §3626(b)(2). The statute applies to existing orders in all prisons, federal, state and local. 18 U.S.C. §3626(b)(1), (g)(5). This right to termination of relief is subject to limitation:

> (3) Limitation. Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

18 U.S.C. §3626(b)(3).

The PLRA provides that "the court shall not enter or approve a consent decree unless it complies with the limitations on relief." 18 U.S.C. §3626(c). The PLRA also limits the duration of any relief obtained whether after trial or by consent to two years. Upon motion, the court must terminate the relief unless the court makes the required findings, and if the relief is not vacated, the process must be repeated on an annual basis thereafter. 18 U.S.C. §3626(b)(1).

"Prospective relief" is defined broadly as "all relief other than compensatory damages," 18 U.S.C. §3626(g)(7), and expressly includes consent decrees. 18 U.S.C. §3626(g)(9). Section 3626 applies to all prospective relief, whether granted before or after the enactment of the PLRA. 18 U.S.C. §3626(b)(1)(A)(iii).

The Proceedings Below

On June 14, 1996, the Sheriff moved the district court to terminate all prospective relief in the consent decree under the PLRA, 18 U.S.C. §3626(b)(2), and on June 24, 1996, the Commissioner moved under the PLRA and Fed.R.Civ.P. 60(b) to vacate the consent decree and final order. Neither defendant alleged any changed factual circumstance. Nor did either rely on any change in the law, other than the PLRA itself. Unlike the previous occasions, the Sheriff proposed no renovations or other measures to minimize the risk of harm to the plaintiffs. The United States was permitted to intervene.

Plaintiffs opposed the motions. They offered expert evidence that, because termination of the relief in the decree would substantially increase the risk to the detainees of violence and disease, the decree remained necessary under §3626(b)(3) of the Act. They contended that the PLRA was unconstitutional.

The district court declined to consider the evidence or make any findings because that would require it to make "predictive" judgments about future conditions. (App. 57a). Accordingly, the district court dissolved all injunctive relief in the consent decree, but did not vacate the decree in its entirety, purporting to leave intact

any adjudications and non-injunctive consensual undertakings of the parties. (App. 67a-68a). All parties appealed.

The First Circuit affirmed the judgment, except that it modified the judgment to require that the decree, and not merely the relief in the decree, be terminated. (App. 29a). It concluded that the termination provision of the statute was constitutional in all respects. Id. It also upheld the refusal of the district court to conduct an inquiry into the likelihood of future violation, concluding that so long as there was no current violation, no such inquiry was required. (App. 26a-27a).

REASONS FOR GRANTING THE WRIT

A. The Issues Presented Are Important.

This case presents extremely important issues concerning the power of Congress over the federal courts. In particular, the case raises the question of whether the doctrine of separation of powers imposes any limit on the power of Congress to reopen a final injunctive decree of an Article III court. The court below held that there is none.

The issues are sufficiently mature as to be ready for review, as they have now been considered by six circuit courts.[4/] Although

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[4/] See Hadix v. Johnson, Nos. 96-2463, 96-2582, 1998 U.S. App. Lexis 387 (6th Cir. 1998); Dougan v. Singletary, 129 F.3d 1424, 1997 WL 738227 (11th Cir. 1997); Benjamin v. Jacobson, 124 F.3d 162, 173 (2d Cir. 1997), reh'g en banc granted, 124 F.3d 162 (2d Cir. 1997); Gavin v. Branstad, 122 F.3d 1081, 1087 (8th Cir. 1997); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996) cert. denied, __ U.S. __, 117 S.Ct. 2460 (1997). All of these circuits have upheld the constitutionality of the PLRA. The Second Circuit, however, only sustained the Act by first concluding -- in disagreement with the other circuits -- that a consent decree survives termination in federal court, and may be enforced in state court. Benjamin, 124 F.3d at 180. The court further concluded that, absent this interpretation of the PLRA, it would run "headlong" into "serious constitutional difficulties." Id. at 177 n.18. That court has now ordered en banc consideration. 124 F.3d 162 (2d Cir. 1997). Contra, Taylor v. Arizona, 972 F. Supp. 1239 (D. Ariz.

no significant conflict has emerged, the constitutional issues will inevitably have to be decided by this Court. Congress is in need of guidance as to the scope of its authority over existing federal equitable decrees. Less than three years ago, the Court decided Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), in which it applied the separation of powers doctrine to bar a Congressional attempt to reopen a final money judgment. If the Court does not review the constitutionality of the PLRA, then Congress will be justified in concluding from the circuit court authority, note 4, supra, that no limit exists on its authority to reopen the judgments of Article III courts in matters of equity.

This case presents the most appropriate vehicle for review, since the legislation at issue was a direct response to the previous decision of the Court in this case, and represents an effort to nullify the very protections which this Court held the plaintiffs were entitled to have -- precisely because the entitlements were contained in a final judgment of the district court.

1997)(termination of relief provision violates the principle of separation of powers), appeals docketed, Nos. 97-16069 - 16071 (9th Cir. June 18, 1997)(argument scheduled for March 9, 1998).

B. The Decision Below is Erroneous.

1. The PLRA should be construed to require an inquiry into whether termination would create or perpetuate a constitutional violation.

The plaintiffs argued below that, in deciding whether to terminate relief, a court must consider whether dissolution of the decree is likely to lead to a constitutional violation. The plaintiffs contended that this inquiry is implicit in the PLRA provision authorizing the continuation of relief when it "remains necessary to correct a current or ongoing violation of the Federal right." 18 U.S.C. §3626(b)(3).[5/]

The Court of Appeals disagreed, affirming the refusal of the district court to make any such inquiry. Under that court's interpretation of the Act, the only pertinent question was whether "conditions that presently exist" violate the constitutional rights of the plaintiffs. (App. 26a). If not, the Court held, "[t]he PLRA imposes no obligation on the trial court to make a predictive inquiry into future conditions before terminating an existing consent decree." (App. 27a). In the lower court's view, plaintiffs are obliged to await recurrence of the violation, and then to file a new lawsuit. Id.

[5/] The phrase "current or ongoing violation" was recently amended to provide "current and ongoing violation." Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, §123(a)(2), 111 Stat. 2440, 2470 (1997).

This interpretation of the Act was incorrect. Prior to enactment of the PLRA, the law was that relief should not be terminated if doing so would "create or perpetuate a constitutional violation." Rufo, 502 U.S. at 391. See Inmates, 12 F.3d at 293 (defendants, in moving to vacate a decree, would have to show "that it is unlikely that the original violations will soon be resumed if the decree were discontinued.") However, under the Court of Appeals' interpretation of the Act, no decree can ever be extended so long as there are no current violations -- no matter how clearly it appears that constitutional violations would follow. Indeed, such a standard could never be met unless the existing decree were ineffective in preventing illegality.

For this reason, in the court below, the United States agreed with the petitioners that a reading of the Act which would require the court to ignore the consequences of dissolution "would pose the serious question whether Congress may limit the courts' remedial authority to effectively redress constitutional violations." Brief for the United States As Intervenor, at 15-16. See also App. 44a, 56a-57a. The Government urged the Court of Appeals to construe the Act to maintain the district court's "core authority . . . to issue prospective relief where there is a present danger of imminent recurrence of a violation of the Constitution or federal statutory right." Brief for the United States at 16. As discussed infra, an Article III court must have the authority to continue relief where there is a realistic likelihood that the failure to do so will result in a constitutional violation, and legislation which forecloses such relief violates the separation of powers doctrine. Indeed, both the district court and the Court of Appeals

have previously found it necessary to make the very sorts of predictive judgments the Court of Appeals has now held are forbidden by the Act. The PLRA should be construed to avoid this infirmity.[6/]

2. The PLRA violates the principle of separation of powers.

a. The PLRA unconstitutionally reopens a final judgment of an Article III Court.

When this case was last here, the Court held that the plaintiffs are entitled to the benefits of their consent decree, even if they cannot demonstrate that the remedy is independently justified as a remedy for unconstitutional wrongdoing. Rufo, 502 U.S. at 391. Rejecting the argument of the defendant Commissioner of Correction that a decree that is not currently required by the Constitution is unenforceable, the Court held that the consent decree in this case is a "final judgment," id. at 391, which may be modified only if the moving party demonstrates a "significant change in circumstances," id. at 383, and "only to the extent that equity requires." Id. at 391.

[6/] Petitioners believe that the Government's standard of "present danger of imminent recurrence" would set the bar too high in most cases. But, however the predictive standard is framed and whatever the proper allocations of burden of proof, it is clear that the courts below erred in construing the PLRA in a manner that makes such factual findings irrelevant.

The PLRA is the Congressional response to Rufo. Under the PLRA, the very relief which the Rufo court upheld must now be immediately terminated unless the plaintiffs can demonstrate that it "remains necessary to correct a current or ongoing violation" of a federal right. 18 U.S.C. §3626(b)(3). Thus, as construed by the Court of Appeals, the PLRA made two revisions in the rights possessed by plaintiffs under the decree. First, it canceled their bargained-for entitlement to non-constitutionally required relief. Second, it reversed the burden of justification: it thrust on the plaintiffs the burden of establishing a legally cognizable need to retain it, and excused the defendants from the requirements that they show a need for change, and that termination will not cause unconstitutional conditions to result. Compare, Rufo, 502 U.S. at 391.

These provisions of the PLRA violate the doctrine of separation of powers. In Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995), this Court held that Congress may not reopen a final judgment of an Article III court. Because Plaut involved a money judgment, the Court of Appeals in this case held that it does not apply to a statute affecting injunctive decrees. Such decrees are not final for separation of powers purposes, the court reasoned, because, as Rufo itself held, they necessarily remain open to revision. (App. 12a-13a).

This ruling was erroneous. The fact that a judgment leaves a decree open to revision on limited grounds does not mean that Congress may dictate that it be terminated altogether, on any ground that the legislature proclaims. The holding below contains no limiting principle; on this theory, Congress could reopen any injunctive

decree it dislikes. Yet, it cannot be true that there are no limitations upon Congressional encroachment upon final injunctive decrees.

The Court of Appeals also erroneously held that the PLRA was a change in governing law which, under the principle of Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855)("Wheeling Bridge"), can be a valid ground to vacate an equitable decree. See System Fed'n No. 91 v. Wright, 364 U.S. 642, 651-52 (1961); Rufo, 502 U.S. at 388-89. But the Wheeling Bridge exception applies to a change in the underlying, substantive law, and the substantive law at issue here -- the constitutional requirement of due process -- has not changed and could not be changed by Congress. The change in law worked by the PLRA is to overturn the previous holding of this Court that plaintiffs are entitled to the non-constitutionally based rights set forth in the consent decree. If legislation which authorized reopening could itself constitute a sufficient change in governing law, then the exception would swallow the rule. Any Act of Congress which nullified any injunctive decree would always, by hypothesis, qualify as a change of circumstance.

Nor can the PLRA be sustained as an exercise of Congress' power to regulate the issuance of injunctions by the federal courts, as contended by the United States below. See Yakus v. United States, 321 U.S. 414, 442 n.8 (1944). One may assume that Congress has the power to regulate the manner and timing of district court review of outstanding injunctions, and even to mandate regular, periodic reviews where no party has so requested. However, the PLRA clearly goes

much further, since it nullifies the non-constitutionally-based entitlements of the decree. Moreover, as discussed below, the Act, as construed by the Court of Appeals, makes it impossible to retain these provisions of the decree even if they are indispensable to preventing an ensuing constitutional violation.

b. The PLRA deprives the judicial department of essential powers.

If an Article III court has jurisdiction to decide a case, it must necessarily have the power to grant effective relief. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971)("remedial decree" is to be judged by its effectiveness.") The PLRA withholds essential powers. First, it eliminates the consent decree as a remedy, since any defendant is always free to disavow any undertaking he has made, as soon as the decree comes up for review. Second, under the Act, every decree automatically expires every year (or two),[7/] and cannot be extended unless plaintiffs prove that defendants currently violate the constitution.

The consent decree is an essential remedy for actual constitutional violations, as is graphically illustrated by the history of this case. The parties here agreed upon the construction of a new facility, rather than force the precipitous release of then-current inmates of the jail. But this was accomplished only because the plaintiffs were

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[7/] The Act provides that the injunction expires after two years, and then, if renewed, it must be reviewed on an annual basis. 18 U.S.C. §3626(b)(1).

able to concede substantial delay in exchange for certain enforceable commitments, which necessarily took time to accomplish. Had the parties not been able to rely on the enforceability of their mutual undertakings, the remedy could never have been effected.

Moreover, the mandate that a decree expire after one, or at most, two years, even if termination creates a constitutional violation, cripples the remedial power of the district court. The Government referred to this power, below, as part of the court's "core authority." Brief for the United States As Intervenor at 16. Yet, under the Act, as construed by the Court of Appeals, plaintiffs cannot establish that the relief "remains necessary" if there are no current violations. So long as defendants are not violating the Constitution on the day their motion is filed, they are to be relieved of any further obligation and are free to return to their illegal behavior on the day the decree is dissolved. And members of the plaintiff class will have to suffer renewed injury -- quite possibly even death -- before the court may take any action.

One could not possibly characterize as "effective" a remedial authority which required the district court to do nothing in the face of evidence that dissolution of the decree would lead directly to a constitutional violation. On the contrary, effective remedial power plainly entails the ability to issue, or continue, relief when there is a realistic likelihood that a violation would be created by vacating the relief. See Rufo, 502 U.S. at 391.

c. The PLRA unconstitutionally prescribes "rules of decision" to the judicial department.

The doctrine of separation of powers also forbids the Congress to prescribe rules of decision to the federal courts for particular cases. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). In such cases, the inquiry is whether the legislation "amend[s] applicable law," or directs a particular outcome under existing law. Robertson v. Seattle Audobon Society, 503 U.S. 429, 441 (1992). In the PLRA the Congress has violated the Klein principle by prescribing unreasonable, outcome-determinative requirements for prison cases alone, without changing the underlying law.

3. The PLRA violates the Due Process Rights of the petitioners.

Since a consent decree is part contract, petitioners have a contractual interest in the bargained-for relief. Rufo, 502 U.S. at 378. The Court of Appeals held that federal legislation impairing these contract rights is sustainable so long as it is supported by any rational basis, since the federal government is not a party to the consent decree itself. (App. 19a-20a). This was erroneous.

The PLRA, by its terms, terminates decrees to which both the state and federal governments are parties. 18 U.S.C. §3626(g)(5). As such, the legislation must be subject to the strict scrutiny required when the federal government seeks to abrogate its own obligations. See National R.R. Passenger Corp. v. Atchison, Topeka & Santa

Fe Ry. Co., 470 U.S. 451, 472 (1985). Thus, Congress and the United States as intervenor are hardly neutral parties, given the reach of the PLRA into every federal prison affected by a consent decree or judgment.

CONCLUSION

For the reasons stated, petitioners pray that this Court grant review of the two questions presented.

Respectfully submitted,

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February 4, 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 97-1261
97-1263

INMATES OF SUFFOLK COUNTY JAIL, ETC., ET AL.,
Plaintiffs, Appellees,

v.

RICHARD J. ROUSE, ETC., ET AL.,
Defendants, Appellants.

No. 97-1262

INMATES OF SUFFOLK COUNTY JAIL, ETC., ET AL.,
Plaintiffs, Appellants,

v.

RICHARD J. ROUSE, ETC., ET AL.,
Defendants, Appellees.

No. 97-1334

INMATES OF SUFFOLK COUNTY JAIL, ETC., ET AL.,
Plaintiffs, Appellees,

v.

RICHARD J. ROUSE, ETC., ET AL.,
Defendants, Appellees,

UNITED STATES OF AMERICA,
Intervenor, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton, U.S. District Judge]

Before

Selya, Circuit Judge,

Aldrich and Coffin, Senior Circuit Judges.

November 7, 1997

SELYA, Circuit Judge. The passage of the Prison Litigation Reform Act, 18 U.S.C.A. § 3626 (Supp. 1997) (the PLRA or the Act), brought cheers to the lips of many prison administrators. In its wake, the Sheriff of Suffolk County and the Massachusetts Commissioner of Correction (collectively, the defendants) cast their gaze toward a consent decree that has governed important aspects of the county's handling of pretrial detainees since 1979. Spying an opportunity to sever the shackles of judicial oversight, the defendants invoked the new law and asked the supervising tribunal, the United States District Court for the District of Massachusetts, to vacate the decree or, in the alternative, to terminate all prospective relief under it. The plaintiffs questioned the Act's constitutionality and raised a host of other objections to the defendants' motions. The district court repulsed the constitutional attack but construed the PLRA to require only the termination of prospective relief, not the vacatur of the consent decree itself. See Inmates of

Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869 (D. Mass. 1997) (D. Ct. Op.).

After careful consideration of the meaning of the PLRA, we vouchsafe the Act's constitutionality against the challenges asserted here and construe it to entitle correctional officials to the termination of existing consent decrees in civil actions involving prison conditions (except in the presence of statutorily prescribed conditions that forestall such termination).

I. BACKGROUND

This litigation deals almost exclusively with the effect of the PLRA on an extant consent decree. Thus, the history of the conflict is of minimal import, and we merely sketch it. The shelves of any reasonably well-stocked law library afford readers who hunger for more exegetic detail ample opportunity to dine elsewhere. See, e.g., Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676, 679-84 (D. Mass. 1973), aff'd, 494 F.2d 1196 (1st Cir. 1974); Inmates of Suffolk County Jail v. Kearney, 734 F. Supp. 561, 562-63 (D. Mass.), aff'd, 915 F.2d 1557 (1st Cir. 1990) (table), vacated, 502 U.S. 367 (1992); Inmates of Suffolk County Jail v. Kearney, 928 F.2d 33, 34 (1st Cir. 1991); D. Ct. Op., 952 F. Supp. at 871-73.

In 1971 the plaintiff class, which consists of present and future pretrial detainees held or to be held in the Suffolk County jail (collectively, the plaintiffs), brought a civil action alleging that the conditions of their confinement - particularly double bunking - violated the Eighth Amendment to the United States Constitution. After extensive skirmishing,

not relevant here, the parties reached a rapprochement, subsequently approved by the district court and embodied in the 1979 consent decree, in which they ratified an architectural plan for a new facility featuring single-occupancy cells. The agreement contemplated the phasing-out of the existing Charles Street jail once the new structure was in place.

As the Scottish poet warned, "the best laid schemes o' mice and men gang aft a-gley," Robert Burns, To a Mouse (1785), and in this case time proved a formidable opponent. Growth in prison population and delays in construction both exceeded expectations. The new facility (the Nashua Street jail) was not completed until mid-1990 and was hard-pressed from the start to cope with the Sheriff's escalating needs. In response to these volatile conditions, the consent decree was modified by court order in 1985, 1990, and 1994. The last of these changes permitted limited double bunking at the Nashua Street facility (the Sheriff having closed the Charles Street facility prior thereto).[1/]

In July 1996 the Sheriff initiated the current engagement. He grasped the weapon that Congress had forged and moved to terminate all prospective relief pursuant to the PLRA. Not to be outdone, the Commissioner moved to vacate the consent decree outright, thus formalizing a

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[1/] Notwithstanding the several emendations that have been made to the original consent decree, we refer to the decree, as modified from time to time, as the "1979 consent decree."

suggestion that the Sheriff had omitted from his motion but had included in the memorandum supporting the motion. When the plaintiffs indicated that they would challenge the Act's constitutionality as part of their opposition, the federal government intervened. After sorting out the components of the parties' extensive asseverational array, Judge Keeton gave the pertinent provisions of the PLRA a narrowing construction and on that basis upheld their constitutionality. He thereupon granted the Sheriff's motion to the extent that the consent decree would "no longer be enforced by an order of specific performance," but declined either to vacate the decree or to "terminate the obligations stated [therein]" because those obligations represented "consensual undertakings of the defendants with court approval." Id. at 883. All parties appealed.

In an effort to cut a passable swath through this legal thicket, we start by construing the termination provision of the PLRA. We then test its constitutionality and, finding no merit in the plaintiffs' constitutional challenges, apply the Act and evaluate the extent of the remediation to which the defendants are entitled.

II. THE PLRA

In parsing the PLRA, we afford de novo review. See United States v. Gifford, 17 F.3d 462, 471-72 (1st Cir. 1994). Such an exercise in statutory interpretation always begins with the language of the statute itself. See Stowell v. Ives, 976 F.2d 65, 69 (1st Cir. 1992). At this stage, an inquisitive court should assume that the words of the statute, if not specially defined, comport with their ordinary meaning,

and that the words, so read, accurately express the legislature's intent. See FMC Corp. v. Holliday, 498 U.S. 52, 57 (1990). In keeping with this principle, the court should "resort to legislative history and other aids of statutory construction only when the literal words of the statute create ambiguity or lead to an unreasonable result." United States v. Charles George Trucking Co., 823 F.2d 685, 688 (1st Cir. 1987) (citation and internal quotation marks omitted).

The PLRA is not a paragon of clarity. In regard to existing federal court orders, it declares that "in any civil action with respect to prison conditions, a defendant or intervenor shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C.A. §3626(b)(2). Such prospective relief shall not terminate, however, "if the court makes written findings based on the record that prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." Id. §3626(b)(3). With regard to relief not yet obtained, the Act contains similar proscriptions. It forbids courts from granting or approving prospective relief "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive

means necessary to correct the violation of the Federal right." Id. §3626(a)(1)(A).

These iterations are clear enough, but uncertainty arises when we examine the Act's definitional instructions. One such passage defines "prospective relief" to include "all relief other than compensatory monetary damages," and then defines "relief" to "mean[] all relief in any form that may be granted or approved by the court . . . includ[ing] consent decrees." Id. §3626(g)(7), (9). "Consent decree," in turn, means "any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements." Id. §3626(b)(1). In a vacuum, the interaction of the Act's mechanics and these definitions is manageable: terminating "prospective relief" as prescribed by section 3626(b)(2) would terminate "all relief," see section 3626(g)(7), which under section 3626(g)(9) "includes consent decrees." Read literally, therefore, once defendants or intervenors show their entitlement to terminate prospective relief, the Act seemingly requires termination of the consent decree itself.

As the district court astutely observed, this result is counterintuitive in that it contradicts the usual understanding of both "relief" and "consent decree." See D. Ct. Op., 952 F. Supp. at 878. The customary definition of "consent decree" likens such decrees to judgments, see Black's Law Dictionary 410 (6th ed. 1990) (defining "consent decree" as "[a] judgment entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing"), and in ordinary usage a judgment is "[a] final

decision of the court resolving the dispute and determining the rights and obligations of the parties," id. at 841-42. "Relief," on the other hand, typically is equated with "remedy," id. at 1292, which is "the means by which a right is enforced or the violation of a right is prevented, redressed, or compensated," id. at 1294. Inasmuch as a remedy effectuates the adjudication expressed in a judgment, one ordinarily would assume that "relief," by extension, effectuates the legal decision, arrived at by consent, in a "consent decree."

Congress conflated the two terms when it described consent decrees as a form of relief rather than as a judgment that engenders relief. The PLRA's equation of "consent decree" and "relief" contradicts conventional understandings and creates a situation in which a strict, language-based construction of the PLRA requires that commonplace legal terms be used in curious ways. This circumstance fosters uncertainty, for a court cannot really tell, without further inquiry, whether the linguistic anomaly is accidental or purposeful (and, thus, whether Congress meant to uproot consent decrees themselves or merely to vitiate the relief attendant to them, when it directed federal courts to facilitate "the immediate termination of any prospective relief" at the behest of prison litigation defendants and intervenors). This uncertainty impels us to consult extrinsic sources in search of guidance as to Congress's intent.

In this instance, the PLRA's legislative history persuades us to embrace the unusual. Congress passed the PLRA in an effort, in part, to oust the federal judiciary from day-to-day prison management. See 141 Cong. Rec. 14,419 (1995) (statement of Sen. Abraham)

("[N]o longer will prison administration be turned over to Federal judges for the indefinite future for the slightest reason."); id. at 14,418 (statement of Sen. Hatch) ("I believe that the courts have gone too far in micromanaging our Nation's prisons."). This evidence of ambient intent inclines us to interpret the statute literally (i.e., as directing courts to terminate consent decrees outright), for it strongly suggests that the PLRA's sponsors wanted to truncate the federal judiciary's involvement in prison administration. The House Conference Report provides even more powerful direction on this score. The Report describes the "explanation of the effect of the action agreed upon by the [legislation's] managers" and states that, by virtue of the PLRA, "[p]rior consent decrees are made terminable upon the motion of either party, and can be continued only if the court finds that the imposed relief is necessary to correct the violation of the federal right." H.R. Conf. Rep. No. 104-378 at 166 (1995). This plain language leaves little room for doubt that Congress intended the PLRA as a last rite for those consent decrees that are incapable of surviving the rigors of section 3626(b)(2).

Of course, we recognize that the plain meaning rule, while a bedrock principle of statutory construction, may yield if giving effect to literal meaning would produce a bizarre result. See Sullivan v. CIA, 992 F.2d 1249, 1252 (1st Cir. 1993); Charles George Trucking, 823 F.2d at 688. But this exception is sparingly employed, and the circumstances of this case give it no purchase. The result that Congress's plain language portends here involves a somewhat unusual use of terms, but it is not unreasonable.

We will not paint the lily. Given the congruence between the text of the statute and the legislature's easily discerned intent, we conclude that Congress meant precisely what it said - however deviant from ordinary usage that may be - when it wrote the PLRA and specially defined its operative terms. We are therefore duty bound to interpret the PLRA as mandating the termination of extant consent decrees altogether unless the district court makes the specific findings that are necessary to keep a particular decree alive.[2/]

III. THE CONSTITUTIONALITY OF THE PLRA

Having construed the PLRA, we next must essay a de novo determination of whether it passes constitutional muster. The plaintiffs say that the Act's termination provision violates the Constitution three times over by transgressing (1) the separation of powers principle, (2) the Due Process Clause, and (3) the Equal Protection Clause. Though ably

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[2/] Because Congress intended the PLRA to effect the termination of consent decrees, we need not elaborate upon what consequences might follow from the termination of prospective relief alone. We note, however, that the Second Circuit has invested substantial time in exploring the potential ramifications of terminating prospective relief while leaving a consent decree otherwise intact. See Benjamin v. Jacobson, ___ F.3d ___, ___ (2d Cir. 1997) [1997 WL 523896, at *15-16]. Inasmuch as our interpretation of the PLRA obviates the need for any such exercise, we take no view of the Benjamin court's conclusions.

presented, none of these assertions carries the day.

A. Separation of Powers.

Few tenets are more central to the genius of our constitutional system than the separation of powers principle. See O'Donoghue v. United States, 289 U.S. 516, 530 (1933) (describing separation of powers as "basic and vital" to our scheme of government). This principle has many incarnations. In one such configuration, it insulates the judiciary from unwarranted legislative intrusions.

The courts' historic independence has its roots in the Constitution, which explicitly provides that "[t]he judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. This delegation of power serves "to safeguard litigants' right to have claims decided before judges who are free from potential domination by other branches of government." Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (citation and internal quotation marks omitted). The due administration of justice demands that this separation remain inviolate. The plaintiffs lament that the PLRA infringes upon the courts' guaranteed separateness in two distinct ways.

1. **Reopening Final Judgments.** The separation of powers principle forbids Congress from reopening the final judgments of Article III courts. See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 240 (1995). After all, if the judiciary's power to render definitive judgments were subject

to congressional control, then the judiciary would become, within its own sphere, subordinate to the legislature.

Moving from the general to the particular, the plaintiffs maintain that the PLRA offends this principle by requiring a district court to rescind relief that the court already has seen fit to award. In mounting this argument, the plaintiffs rely heavily on the Justices' observation, made in an earlier round of this litigation, that "a consent decree is a final judgment that may be reopened only to the extent that equity requires." Rufo, 502 U.S. at 391. From this thread, the plaintiffs weave a syllogism: Congress cannot order the reopening of final judgments without offending the separation of powers principle, a consent decree is a final judgment, and therefore Congress cannot mandate the reopening of consent decrees.

This reasoning frays because consent decrees of the type at issue here are not "final judgments" for the purpose of a separation of powers analysis. In a recent articulation of the rule that the legislature cannot interfere with final judgments of Article III courts, the Supreme Court carefully carved out an exception and endorsed a line of cases sanctioning legislation "that altered the prospective effect of injunctions entered by Article III courts." Plaut, 514 U.S. at 232. This exception did not spring full-blown from Justice Scalia's brow. To the contrary, its roots burrow deep into our constitutional soil. An early exemplar is Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855). That hoary case established that, although a judgment at law is impervious to legislative assault, a forward-looking judgment in equity can

succumb to legislative action if the legislature alters the underlying rule of law. See id. at 431-32. More recent examples also exist. See, e.g., Landgraf v. USI Film Prods., 511 U.S. 244, 273 (1994); System Fed'n No. 91 v. Wright, 364 U.S. 642, 651-52 (1961).

Lower courts sometimes are required to follow precedent for precedent's sake, no matter how much the yoke chafes. Here, however, our burden is light, for the Wheeling Bridge exception is not only mandated by precedent but also makes logical sense. The legitimacy of prospective equitable relief rests upon the presumed persistence of the conditions that originally justified the relief. If forward-looking judgments in equity were inviolate, then one of two scenarios would develop: either the legislature would be stripped of the ability to change substantive law once an injunction had been issued pursuant to that law, or an issued injunction would continue to have force after the law that originally gave the injunction legitimacy had been found wanting (and, hence, altered). The first of these possible results would work an undue judicial interference with the legislative process, while the second would create an intolerable tangle in which some laws applied to some persons and not to others. Since the separation of powers principle is a two-way street, courts must be careful not to embrace a legal regime that promotes such awkward scenarios.

To recapitulate, consent decrees are final judgments, but they are final judgments subject to revision "to the extent that equity requires." Rufo, 502 U.S. at 391. Plaut and Wheeling Bridge, read together, teach that equity requires, and the

separation of powers principle permits, legislatures to direct that courts respond to changes in substantive law by revisiting forward-looking injunctions. See Plyler v. Moore, 100 F.3d 365, 371 (4th Cir. 1996). The Court stated the point with great clarity earlier in this litigation: "A consent decree must of course be modified if, as it later turns out, one or more of the obligations [it imposes] has become impermissible under federal law." Rufo, 502 U.S. at 388.

The plaintiffs try to turn these verities to their advantage by asserting that the underlying law here - the Eighth Amendment - has not changed. This is resupinate reasoning. The relevant underlying law in this case is not the Eighth Amendment, as there has been no finding of an ongoing constitutional violation. Rather, the relevant underlying law relates to the district court's authority to issue and maintain prospective relief absent a violation of a federal right, and the PLRA has truncated that authority. See Benjamin v. Jacobson, ___ F.3d ___, ___ (2d Cir. 1997) [1997 WL 523896, at *9]. The termination of a consent decree in response to the PLRA, therefore, merely effectuates Congress's decision to divest district courts of the ability to construct or perpetuate prospective relief when no violation of a federal right exists. Given this shift in the relevant underlying law, the termination of prospective relief pursuant to the PLRA does not amount to a legislative reopening of a final judgment.

2. **Rules of Decision**. The plaintiffs next contend that the PLRA's termination provision violates a different aspect of the separation of powers principle, articulated

in United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). Klein had its genesis in the aftermath of the Civil War, when Congress passed a statute that permitted noncombatant Confederate landowners to recover confiscated goods upon proof of their loyalty to the Union. Klein, the administrator of the estate of Wilson, a Confederate sympathizer, attempted to recover Wilson's goods pursuant to this statute. Mindful that the Supreme Court had previously declared that a presidential pardon was conclusive proof of loyalty, see United States v. Padelford, 76 U.S. (9 Wall.) 531 (1869), Klein tendered evidence that Wilson had received such a pardon. While the case was pending, Congress passed a statute which declared that a presidential pardon was proof of disloyalty and directed the dismissal of any pending recovery action brought on behalf of a pardon recipient. See Klein, 80 U.S. at 131-34.

The Supreme Court invalidated the new statute on separation of powers grounds. It ruled that if the law were allowed to stand, then the trial court would have "jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction." Id. at 146. Such a requirement "is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power" and thus "passe[s] the limit which separates the legislative from the judicial power." Id. at 146-47. The Klein Court distinguished Wheeling Bridge as a situation in which "the court was left to apply its ordinary rules to the new circumstances created by the act [whereas in Klein] no new circumstances have been created by legislation. But the court is forbidden

to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary." Id. at 147.

The plaintiffs argue that the case at hand resembles Klein more than Wheeling Bridge because the law underlying the consent decree - the Eighth Amendment - remains constant, yet the PLRA imposes a rule of decision by instructing courts to terminate prospective relief. This argument misapprehends the situation. As noted above, the relevant underlying law for present purposes is not the Eighth Amendment, but the power of federal courts to grant prospective relief absent a violation of a federal right. Thus, the PLRA does not run afoul of Klein because it does not tamper with courts' decisional rules - that is, courts remain free to interpret and apply the law to the facts as they discern them. Because the PLRA leaves the courts' adjudicatory processes intact, it does not transgress the Klein doctrine. See Gavin v. Barnstad, ___ F.3d ___, ___ (8th Cir. 1997) [1997 WL 434633, at *7-8].

B. Due Process.

The plaintiffs base their next two objections on the Due Process Clause. The first rests on the postulate that the consent decree is a final judgment, the existence of which vests property rights in the parties that cannot be alienated by Congress. By purporting to terminate consent decrees, this thesis runs, the PLRA not only reopens final judgments but also robs the judgments' beneficiaries of rights secured to them thereunder. The plaintiffs' second objection posits that the 1979 consent decree constitutes a contract and that due process

limits the extent to which the federal government can enact legislation that has a deleterious effect on preexisting contracts. Both objections lack force.

1. **Vested Rights**. The plaintiffs' first objection fails because, at least in the absence of exceptional circumstances well beyond any that are present here, frankly modifiable decrees cannot create vested rights. See Landgraf, 511 U.S. at 273 (noting that "relief by injunction operates in futuro, and that [a party] ha[s] no vested right in the decree entered by the trial court") (citation and internal quotation marks omitted). As we have already pointed out, consent decrees are not merely final judgments, but a special species of that genre - final judgments that can be "reopened . . . to the extent that equity requires." Rufo, 502 U.S. at 391. In the instant case, equity requires termination of the 1979 decree because Congress has withdrawn the power that animated the decree. See 18 U.S.C.A. §3626(a)(1)(A), (b)(2).

To be sure, the plaintiffs argue that this reasoning is circular. But, given the tenuous nature of consent decrees, that argument will not wash. There is a basic difference between a money judgment and a consent decree: the former is fixed, whereas the latter is necessarily impermanent. Thus, insofar as a consent decree has prospective effect, it must on motion be adjusted to accommodate material changes of fact or law germane to its issuance.[3/] See Rufo, 502 U.S.

[3/] This precept could not come as a surprise to the plaintiffs. In the last modification of the consent decree, under date of June 14, 1994, the district court

at 393. Here, the PLRA has altered the standard by which courts can continue forward-looking relief, and this profound change in the relevant underlying law entitles the defendants to termination of the decree.

2. **Contract Rights**. The plaintiffs' second due process objection is equally unavailing. Even if we make two broad assumptions that are integral to their position - namely, that the consent decree is a contract and that the PLRA impairs that contract - the objection founders. The Supreme Court delineated the standard of review for federal legislation that impairs contractual relations in National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co., 470 U.S. 451 (1985). If a substantial impairment of a contract right is found or assumed, "the reviewing court next determines whether the impairment is of constitutional dimension." Id. at 472. It engages in this analysis by examining the statute and identifying the parties to the contract. See id. "When the contract is a private one, and when the impairing statute is a federal one, this next inquiry is especially limited, and the judicial scrutiny quite minimal. The party asserting a Fifth Amendment due process violation must overcome a presumption of constitutionality and establish that the legislature has acted in an arbitrary and irrational way." Id. (citations and internal quotation marks omitted).

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advised the parties that it would entertain future motions to modify "upon a showing of good cause . . . or upon a showing of material change in circumstances."

Even though the federal government is not a party to the "contract" in issue here (the consent decree), the plaintiffs seek to upgrade the level of scrutiny. Their gambit depends upon the Court's opinion in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985), which, they say, stands for the proposition that the states have sufficient representation in the federal government to influence its actions, and that, by extension, the federal sovereign's actions should be attributed to the states. From this coign of vantage, they argue that, since federal laws are enacted by a government organized for the benefit of the several states, a federal act that impairs a contract to which a state is a party should receive the same degree of scrutiny as a federal act that impairs a contract to which the United States is a party.

This ratiocination is predicated on a strained reading of Garcia. The Garcia Court held that state participation in the federal government provides a sufficient safeguard to prevent federal overreaching vis-à-vis the states. See id. at 552. There is, however, no basis in Garcia or elsewhere to suggest that federal legislation which benefits state governments is tantamount to self-dealing and thus subject to heightened scrutiny. We therefore summarily reject the plaintiffs' reading of Garcia and the attendant claim that the federal government somehow became a constructive party to the 1979 consent decree.

This gets the grease from the goose. Because the federal sovereign is not a party to the consent decree, either in fact or by indirection, we need only subject the PLRA to a rational basis review. See National Passenger, 470 U.S. at 471-72; see also

United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977) (holding that "[l]egislation adjusting the rights and responsibilities of contracting parties must be [based] upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption").

Stressing that the PLRA abrogates existing responsibilities, the plaintiffs make the obligatory argument that the law is arbitrary and irrational. But these animadversions vastly overstate the case. The PLRA only affects agreements that have at all times remained subject to modification should circumstances change. And, moreover, by facilitating termination, the PLRA's termination provision forges a practical, commonsense linkage between a changed circumstance - the district courts' newfound inability to grant or enforce prospective relief absent a violation of a federal right - and an existing consent decree. Consequently, section 3626(b)(2) survives rational basis scrutiny.

C. **Equal Protection**.

The plaintiffs also advance a pair of arguments based on the Equal Protection Clause. First, they note that pretrial detainees, by definition, have not yet been convicted of the crime(s) with which they have been charged. Thus, they enjoy both the presumption of innocence, see In re Winship, 397 U.S. 358 (1970), and the right not to be punished prematurely, see Bell v. Wolfish, 441 U.S. 520 (1979). Building on this foundation, the plaintiffs assert that the PLRA is subject to strict scrutiny (which it fails) because it abridges these fundamental rights. In the alternative, they claim that the Act violates core principles of equal

protection because it has no rational relationship to legitimate state interests.

1. **Fundamental Rights**. Although the PLRA circumscribes a district court's ability to provide prospective relief to pretrial detainees (as well as all other prisoners) absent a violation of a federal right, we conclude that this feature of the Act does not abridge the pretrial detainees' right to be free from punishment. Prison conditions either violate fundamental rights (in which event they also violate federally secured rights) or they do not violate fundamental rights (in which event they do not violate federally secured rights). In the former case, the PLRA permits relief to redeem the fundamental right. In the latter case, the PLRA does not permit relief, but as no violation exists, the PLRA's denial of relief does not imperil pretrial detainees' fundamental rights.

It is also possible to argue that the PLRA implicates the fundamental right of access to the courts, see Wolff v. McDonnell, 418 U.S. 539, 578 (1974), and that, by withdrawing the power to grant inmates prospective relief in a manner available to other classes of people, the PLRA trammels inmates' rights of access. This line of reasoning does not withstand close examination. Under the PLRA, the courthouse doors remain open and the withdrawal of prospective relief - above and beyond what is necessary to correct the violation of federally protected rights - does not diminish the right of access. In a nutshell, while there is a constitutional right to court access, there is no complementary constitutional right to receive or be eligible for a particular form of relief. See Crowder v. Sinyard, 884 F.2d 804, 814

(5th Cir. 1989), abrogated on other grounds by Horton v. California, 496 U.S. 128 (1990).

2. **Rational Basis**. The plaintiffs' final constitutional challenge suggests that the PLRA violates the Equal Protection Clause because it "singl[es] out a certain class of citizens for disfavored legal status or general hardship[]." Romer v. Evans, 116 S. Ct. 1620, 1628 (1996). This suggestion is ill-conceived. A statute that neither abridges a fundamental right nor operates against a suspect class receives rational basis review when it is challenged under the Equal Protection Clause. See Heller v. Doe, 509 U.S. 312, 318-19 (1993). The PLRA is such a statute: as we already have explained, it does not impair a fundamental right, and the plaintiffs do not assert that pretrial detainees are a suspect class. Thus, rational basis review applies.

A statute survives rationality review if it "bear[s] a rational relationship to an independent and legitimate legislative end." Romer, 116 S. Ct. at 1627. The PLRA's legislative history indicates that the drafters intended the Act to "address the alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners," to "mak[e] it much more difficult for Federal judges to issue orders directing the release of convicted criminals from prison custody," 141 Cong. Rec. 14,413 (1995) (statement of Sen. Dole), and to wrest control of state penitentiaries from federal courts so that states "will be able to run prisons as they see fit unless there is a constitutional violation," id. at 14,419 (statement of Sen. Abraham). These purposes are clearly legitimate. They involve the allocation of public resources, the maintenance of public safety, and the desire

to institutionalize a state-centric conception of our federal system. The means chosen to effect these ends are stern, but they certainly bear a reasonable relationship to the announced legislative goals. From this perspective, the PLRA easily passes rational basis review.

The plaintiffs try to undermine this appraisal by asserting that an anti-inmate animus drove Congress's approval of the PLRA. They claim that such an invidiously discriminatory intent violates the Court's admonition that a legislature cannot construct legislation "for the purpose of disadvantaging the group burdened by the law." Romer, 116 S. Ct. at 1628; see also United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of `equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.").

We need not grapple with the intriguing question of whether the Romer Court meant to add a new "animus test" to the armamentarium of rationality review. The short, entirely dispositive answer to the plaintiffs' supplication is that the evidence in the record simply does not show that the legislature inappropriately sought to disadvantage the plaintiff class.

The only "proof" that the plaintiffs offer consists of political rhetoric, such as the statement on the Senate floor that "criminals, while they must be accorded their constitutional rights, deserve to be punished. Obviously, they should not be tortured or treated cruelly. At the same

time, they also should not have all the rights and privileges the rest of us enjoy. Rather, their lives should, on the whole, be describable by the old concept known as `hard time.'" 141 Cong. Rec. 14,419 (1995) (statement of Sen. Abraham). Passing the obvious point that such rhetoric must be taken with a grain of salt - elected officials, after all, have been known to strike poses for public consumption - the most that fairly can be said is that oratory of this sort may evince a philosophical shift; it hardly betokens an impermissible animus. In all events, the state is well within its right to punish persons convicted of crimes, and a retributive desire to effect such punishment consequently does not offend any supposed "animus test." Furthermore, the plaintiffs are not criminals, but pretrial detainees; they have not been found guilty of any crimes. Thus, even if the political rhetoric spotlighted by the plaintiffs qualified as animus directed at criminals, it would not constitute cognizable animus for present purposes.

In sum, an objective reading of the legislative history demonstrates that the plaintiffs' inability to obtain prospective relief does not spring from Congress's wish to do them harm, but from its desire to minimize the occasion for federal courts to administer state prisons. Consequently, the PLRA does not succumb to any theoretical "animus test" contained within the Equal Protection Clause.

IV. APPLYING THE PLRA

The plaintiffs have a fallback position. They contend that, even if the PLRA is constitutional, the 1979 consent decree should remain intact because (1) the district

court previously made findings sufficient to save the decree by operation of the Act, see 18 U.S.C.A. §3626(b)(2), or (2) if the findings to date are inadequate, the district court should have conducted an inquiry into whether a violation of a federal right exists currently (or probably will come into existence if the strictures of the consent decree are lifted) before implementing the PLRA's termination provision. We reject both contentions.

Answering the question of whether prison conditions constitute an ongoing violation of a federal right under the PLRA necessitates both a definition of the right at stake and an assessment of a specific compendium of prison conditions. Accordingly, such a question comprises a mixed question of fact and law, the answer to which we review "along a degree-of-deference continuum, ranging from plenary review for law-dominated questions to clear-error review for fact-dominated questions." Johnson v. Watts Regulator Co., 63 F.3d 1129, 1132 (1st Cir. 1995). Here, the question is more factual than legal: inasmuch as the double bunking of pretrial detainees does not in and of itself violate the Constitution, see Bell v. Wolfish, 441 U.S. at 541, the district court's conclusion that the double bunking of which the plaintiffs continue to complain is not in violation of a federal right must be challenged, if at all, principally on the facts. Thus, the standard of review is highly deferential. See Huguley v. General Motors Corp., 999 F.2d 142, 146 (6th Cir. 1993).

We have carefully reviewed the record and culled out the sparse factual findings that the court made in the relevant time frame. No useful purpose would be served by

examining these findings in minute detail. Judge Keeton concluded that they did not satisfy the requirements of section 3626(a) or (b). See D. Ct. Op., 952 F. Supp. at 880. A trial court generally is thought to be the best interpreter of its own prior rulings and findings, see, e.g., Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel, 833 F.2d 1059, 1066-67 (1st Cir. 1987); Lefkowitz v. Fair, 816 F.2d 17, 22 (1st Cir. 1987), and this case is no exception. At any rate, we agree with Judge Keeton's conclusion. It is simply implausible to suggest, on this record, that the district court's assessment of the existing factual findings is clearly erroneous.

The plaintiffs' follow-on argument gains them no ground. As to the conditions that presently exist, we defer to the district court's intimate familiarity with this protracted litigation and to its informed evaluation of current prison conditions. See D. Ct. Op., 952 F. Supp. at 880 (observing that "no evidence is before the court to support findings that defendants are not in compliance with the terms of the modified Consent Decree"). Deference is especially appropriate here since, under the terms of an order that it entered on June 14, 1994, the district court for some time had been receiving and evaluating periodic reports from the Sheriff concerning incidents of assaultive behavior, rape, disease, and the like at the Nashua Street jail.

As to what the future may bring, we cannot criticize Judge Keeton's reluctance to play the oracle. Presented with the opportunity to make further findings before deciding the defendants' motions, the judge declined. He noted several cogent reasons

why it made sense to leave the question of whether a violation of a federal right might follow the termination of prospective relief under the consent decree to another day. See id.

We discern no error. This is neither the time nor the place to press an inherently speculative claim of harm to come. The PLRA imposes no obligation on the trial court to make a predictive inquiry into future conditions before terminating an existing consent decree, and we are not aware of any other basis for burdening the court with such a requirement. Quite often, "[p]resent fears are less than horrible imaginings." William Shakespeare, Macbeth, act 1, sc. 3 (1605). If, in this instance, the plaintiffs' trepidation proves justified, they remain free to initiate a new round of proceedings designed to show that post-termination prison conditions actually do violate their federally protected rights.

V. VACATING THE CONSENT DECREE

Having construed the PLRA and established that its termination-of-prospective-relief provision passes constitutional muster, that the conditions for exemption have not been met, and that the Act's mandate requires the district court to terminate the consent decree, we now mull whether that mandate means that an order must be entered not only terminating the consent decree but actually vacating it. The district court thought not. See D. Ct. Op., 952 F. Supp. at 883-84. We agree.

The defendants' opposition is easily dispatched. Nothing in the PLRA or its legislative history speaks of vacating consent decrees. Congress chose to use the

verb "terminate" and to eschew the verb "vacate." The distinction between these two words is clear: "terminate" means "to put an end to" or "to end," Black's Law Dictionary at 1471, whereas "vacate" means "to annul" or "to render . . . void," id. at 1548.

In the present context, this distinction may well possess practical significance. Cf. Benjamin, ___ F.3d at ___ [1997 WL 523896, at *15-16] (explaining that court's view of the distinction between terminating prospective relief and vacating a consent decree). While terminating a consent decree strips it of future potency, the decree's past puissance is preserved and certain of its collateral effects may endure. Vacating a consent decree, however, wipes the slate clean, not only rendering the decree sterile for future purposes, but also eviscerating any collateral effects and, indeed, casting a shadow on past actions taken under the decree's imprimatur. As nothing in the PLRA even hints that consent decrees must be vacated when prospective relief is terminated, we uphold the district court's ruling that the PLRA does not require vacation of the 1979 decree.

VI. CONCLUSION

We need go no further. To the extent that the parties advance other arguments, we reject them out of hand. None requires elaboration.[4/]

[4/] The Commissioner moved below for vacation of the 1979 consent decree under Fed. R. Civ. P. 60(b) and now appeals the denial of that motion. We need not address that aspect of the matter. At oral argument in this court, the Commissioner agreed that

For the reasons stated herein, we affirm so much of the judgment below that (a) found the PLRA to be constitutional, (b) terminated all prospective relief under the 1979 consent decree, and (c) refused to vacate that decree. We direct, however, that the judgment be revised to terminate the consent decree itself and we remand for the entry of a modified judgment (together with such further proceedings, if any, as the district court may deem necessary in light of this opinion).

Affirmed as modified and remanded. All parties shall bear their own costs.

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if the consent decree were to be terminated, the Rule 60(b) issue could be set to one side. We take the Commissioner at his word and therefore express no opinion as to the merits of the Rule 60(b) claim.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 97-1261
97-1263

INMATES OF SUFFOLK COUNTY JAIL, ETC., ET AL.,
Plaintiffs, Appellees,

v.

RICHARD J. ROUSE, ETC., ET AL.,
Defendants, Appellants.

No. 97-1262

INMATES OF SUFFOLK COUNTY JAIL, ETC., ET AL.,
Plaintiffs, Appellants,

v.

RICHARD J. ROUSE, ETC., ET AL.,
Defendants, Appellees.

No. 97-1334

INMATES OF SUFFOLK COUNTY JAIL, ETC., ET AL.,
Plaintiffs, Appellees,

v.

RICHARD J. ROUSE, ETC., ET AL.,
Defendants, Appellees,

UNITED STATES OF AMERICA,
Intervenor, Appellant.

JUDGMENT

Entered: November 7, 1997

This cause came on to be heard on appeal from the United States District Court for the district of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: **The judgment of the district court is affirmed as modified and remanded to the district court for further proceedings in accordance with the opinion issued this date. All parties to bear their own costs.**

By The Court

PHOEBE D. MORSE, CLERK

BY:/s/_____
Administrative Manager

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Plaintiffs

v.

CIVIL ACTION
NO. 71-162-REK

SHERIFF OF SUFFOLK COUNTY, et al.,
Defendants

Opinion
January 2, 1997

Keeton, District Judge.

Pending before the Court are the following motions:

(1) Motion of the Sheriff of Suffolk County to Terminate All Prospective Relief Within the Meaning of and Pursuant to 18 U.S.C. § 3626(b)(2) (Docket No. 375, filed June 14, 1996); and

(2) Defendant Commissioner of Correction's Motion to Vacate Consent Decree (Docket No. 378, filed June 24, 1996).

Plaintiffs oppose both motions. The United States of America has intervened and filed a Memorandum of Law of the United States of America with Respect to the Constitutionality of Certain Provisions of

the Prison Litigation Reform Act (Docket No. 398, filed September 26, 1996).

The motions are allowed in part and denied in part.

I. Procedural Background Preceding the Prison Litigation Reform Act

The procedural history of this twenty-five-year-old litigation is well documented in many of this and other courts' opinions, most recently in this court's Memoranda an Orders of March 31, 1993, January 25, 1994 and June 14, 1994. This opinion recites only briefly the procedural history and focuses primarily on the most relevant parts of the modified Consent Decree that is the subject of the pending motions.

The plaintiff class, all pretrial detainees being held in the Suffolk County Jail, brought suit against the defendants in 1971, challenging as unconstitutional the conditions of their confinement. At the time, Suffolk County pretrial detainees were held at the Charles Street Jail, which was built in 1848. Although invoking numerous problems with the aging facilities, the plaintiffs' lawsuit focused especially on the defendants' practice of "double-bunking" inmates in cells designed to hold only one person. In 1973, then presiding Judge Garrity found that the conditions at the Charles Street Jail violated the constitutional rights of the plaintiffs, ordered a permanent injunction against double-bunking at the jail, and set a date after which no pretrial detainees could be held at the Charles Street Jail.

After years of substantive and procedural conflict, the parties entered into

the Consent Decree on May 7, 1979. The decree was modified on April 11, 1995, April 22, 1985, August 30, 1990 and June 14, 1994. Key provisions of the Consent Decree, as modified, are set forth here.

May 7, 1979 Consent Decree. Following introductory paragraphs in which the defendants expressed their desire to "fulfill their duties under state and federal law to provide, maintain and operate as applicable a suitable and constitutional jail for Suffolk County pretrial detainees" and the plaintiffs expressed their desire that they "not be exposed to unconstitutional conditions of pretrial confinement," the document declared:

> And whereas all parties desire to avoid further litigation on the issue of what shall be built and what standards shall be applied to construction and design [of the new jail];
>
> And whereas all parties agree that for the purpose of this litigation the Suffolk County Detention Center, Charles Street Facility, Architectural Program which is attached and, as modified ... below, incorporated in this decree, sets forth a program which is both constitutionally adequate and constitutionally required.

April 11, 1985 Order Modifying Decree. Having recognized the changed circumstance of an unforeseen magnitude of increase in the jail population, the court in this order granted the plaintiffs' motion to modify the Consent Decree in the following way:

> It is therefore ordered, adjudged and decreed that the Consent Decree be modified as follows:
>
> Nothing contained in the Consent Decree, however, shall prevent the defendants from increasing the capacity of the new facility if the following conditions are satisfied:
>
> (a) single-cell occupancy is maintained under the design for the facility; [and]
>
> (b) under the standards and specifications of the Architectural Program, as modified, the relative proportion of cell space to support services will remain the same as it was in the Architectural Program; ....

August 30, 1990 Order. As the court recognized in its June 14, 1994, Final Order, this Order modified the Consent Decree to the following extent:

> 1. Plaintiffs' Motion for Order to Transfer Female Detainees to Nashua Street Jail is allowed.
>
> 2. The Sheriff of Suffolk County and the Commissioner of Correction shall transfer all Suffolk County female pre-trial detainees currently held at MCI-Framingham to the Suffolk County Jail at Nashua Street.
>
> 3. This Order does not prevent the Sheriff from

reallocating space within the new facility, as long as the following conditions are satisfied:

> (a) The Sheriff of Suffolk County shall not house more than one detainee in a cell at the new facility.
>
> (b) The relative proportion of the cell space to support services remains the same as in the Architectural Program attached to the Consent Decree.
>
> (c) The Sheriff of Suffolk County shall not transfer from the Nashua Street Jail female detainees to other institutions unless more than forty female detainees are committed to his custody, in which event he is not prevented from transferring the number of female detainees necessary to reduce the number of female detainees in the new facility to forty.

June 14, 1994 Final Order. The Final Order modified the Consent Decree as follows:

> (1) The Consent Decree of May 7, 1979 (as modified by the orders of April 11, 1985, April 22, 1985, and August 30, 1990) is further modified to the extent that, and only to the extent that, as long as no inmates other than

Suffolk County pretrial detainees are assigned to the Nashua Street facility, the Sheriff

(a) may alter up to 100 cells to permit double occupancy, and

(b) may, at any given time, place two inmates in each of the altered cells to the extent necessary to have space within the Nashua Street facility for all Suffolk County pretrial detainees committed to the Sheriff's care.

In the Final Order, the court also "permitted" the Sheriff to act in accordance with an agreement between the parties. In pertinent part, the agreement forbade the use of the "House of Detention" or the "City Prison" in the Suffolk County Courthouse to house pretrial detainees, and required the Sheriff to report the need, in the case of an emergency, to use any facility other than the Nashua Street Jail to house the plaintiff inmates.

The agreement allowed the Sheriff to hold female members of the plaintiff class at the Suffolk County House of Correction, with a cap on the number of female detainees that could be held there and a limit on the number of cells in which the female detainees could be double-bunked. Under this part of the agreement, any cells made available by the transfer of female detainees from the Nashua Street Jail were to be used for single-cell occupancy by male inmates.

Finally, the June 14, 1994 Final Order contained the following directives regarding the eventual closing of the case:

> (3) This civil action, though not finally closed as of entry of this order, remains open for limited purposes only. The court will hear a motion by any party for further proceedings upon a showing of good cause, for example, upon a prima facie showing of non-compliance with the court's order, or upon a showing of material change in circumstances after the date of entry of this order.
>
> (4) On a date five years from entry of this order, the case will be finally closed unless on appropriate motion and for good cause shown the court orders an earlier or later closing date. After the case is finally closed, no further supervision by this court will occur, and no further motion for modification of the consent decree will be entertained by the court, unless an appropriate motion to reopen, meeting the criteria applicable to relief from a final judgment, has first been allowed.

On the same date as the Final Order, the court also entered a Separate Order for Reporting, ordering the Sheriff to report every six months from the date of the entry of the Order on the number of violent and sexual assaults at the Nashua Street Jail and the incidence of tuberculosis among inmates detained there. The responsibility for

reporting would end with the closing of the case in 1999.

II. Pertinent Provisions of the Prison Litigation Reform Act

Exactly two years after the June 14, 1994 Final Order, the Sheriff filed the present motion. The Sheriff bases his motion on the provisions in the recently passed Prison Litigation Reform Act. Pub. L. 104-134, §§801, 802 (1996)(amending 18 U.S.C. §3626) ("PLRA"), governing remedies in prison-conditions litigation.

Under §3626(a), as amended by the PLRA, a district court must make specific findings on designated subjects before it can grant "prospective relief" in a civil action involving prison conditions. Specifically, a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. §3626(a)(1)(A). Subsection (c) states that the requirement of findings applies as well to judicial approval of consent decrees.

The PLRA also provides for termination of prospective relief in cases where such relief has been granted without the court's having made the requisite findings. Upon motion to the court, a defendant or intervenor is entitled to "immediate termination of prospective relief" in cases where a court has granted such relief without making the requisite findings. 18 U.S.C. §3626(b)(2). Prospective relief may continue, however, if the court "makes written findings based on the record that

prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." Id. Thus, termination of an order for prospective relief may be avoided if the district court determines that it has already made, or has a basis for making, and does make, the findings that the prospective relief is tailored to be the least intrusive means to correct the violation of the federal right.

Subsection (g) of §3626 provides specific definitions for the terms of the statute. In pertinent part, the statute defines "prospective relief" as "all relief other than compensatory monetary damages," and defines "relief" as "all relief in any form that may be granted or approved by the court, and includes Consent decrees but does not include private settlement agreements." 18 U.S.C. §3626(g)(7) and (9). The term "consent decree" is defined as "any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlement." Id. at §3626(g)(1).

The statute contains an automatic stay provision, authorizing a court to stay all prospective relief pending the court's decision on a motion to terminate all prospective relief, beginning 30 days from the filing of such a motion. The parties in this case, however, have agreed to waive this provision in order to allow time for their submissions, and the court's consideration of them, before the court rules. In these circumstances, I conclude that the 30-day

automatic stay provision and potential challenges to its constitutionality are not at issue in this case.

III. Primary and Alternative Positions of the Parties

Defendants argue that under the terms of the PLRA, which apply to "all prospective relief whether such relief was originally granted or approved before ... the date of enactment of this title," 18 U.S.C. §3626(b)(2)(iii), the court should immediately terminate all prospective relief entered in this case. Defendants contend that the court's previous decisions do not make the findings required under §3626(a), and that there is no showing of a current or ongoing constitutional violation at the Nashua Street Jail that would support the court's making these findings now under §3626(b). Citing numerous affidavits filed along with their motions, as well as the bi-annual reports made by the Sheriff under the Separate Reporting Order, defendants allege that the reports show that the double-bunking allowed by the Final Order of June 14, 1994, has not resulted in any increase in violence or disease among the inmate population. Therefore, defendants argue, there is no evidence that would support a finding that prospective relief is still warranted under the terms of the PLRA.

The Sheriff asks the court to "vacate" the Consent Decree and Final Order "insofar as either provides prospective relief for alleged conditions of overcrowding" (Revised Memorandum in Support of the Sheriff of Suffolk County's Motion to Terminate All Prospective Relief Within the Meaning of and Pursuant to 18 U.S.C. §3626(b)(2)). The Commissioner joins the Sheriff in this

contention, and argues further that the Consent Decree in its entirety constitutes prospective relief as defined by the PLRA. The Commissioner argues that vacating the decree is also warranted under Fed. R. Civ. P. 60(b), based on the changed circumstances evidenced by the affidavits and reports filed with the court after issuance of the Final Order in June, 1994, as well as the change in circumstances wrought by the PLRA itself.

Plaintiffs attack the defendants' motion on both non-constitutional and constitutional grounds. In order to avoid addressing the serious constitutional problems posed by the PLRA, plaintiffs contend, the court should determine that the findings and conclusions contained in its previous decisions are sufficient to satisfy the findings requirement of §3626(a). In the alternative, they ask the court to make now the findings required by §3626(b)(2). if these findings cannot be made, plaintiffs argue that the court must reach and rule upon their challenge to the statute's constitutionality.

According to the plaintiffs, the PLRA violates a number of constitutional provisions. Plaintiffs argue that the PLRA is unconstitutional because it violates the separation of powers doctrine in that the statute reopens a final judgment in violation of the principles most recently articulated in Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995); prescribes a rule of decision for the judiciary, a power that is forbidden to Congress under the decision of United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); and impermissibly restricts the ability of the judiciary to remedy constitutional violations. In addition to invoking the independence of the American judiciary in our constitutional system,

plaintiffs' separation of powers arguments rest primarily on the contention that the Consent Decree is a final judgment, and that Congress cannot interfere with a final judgment unless it changes the underlying substantive law and does so in circumstances in which retroactive substantive change is constitutionally permissible. Plaintiffs also invoke a number of other constitutional doctrines, arguing that application of the termination provisions of the PLRA would violate the Due Process Clause of the Fifth Amendment, unconstitutionally impair the plaintiffs' contract with the defendants, and deny to plaintiffs the equal protection of the law.

Not surprisingly, defendants disagree with plaintiffs' assessment of the constitutionality of the PLRA. Defendants argue that the Consent Decree is not a final judgment because the court still maintains jurisdiction over the case, and because the relief authorized by the Consent Decree is subject to equitable modification based on changed circumstances. Citing Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855), defendants argue that prospective relief of the type granted in this case is fundamentally different from monetary relief, and that the principles of Plaut do not apply. Defendants also argue that the PLRA does change the substantive law by defining a remedial standard to be applied by the courts in formulating relief. Instead of prescribing a rule of decision, defendants argue, the PLRA constitutes a legitimate act of Congress well within the constitutionally granted authority of Congress (when acting with the assent of the President) to define the jurisdiction of Article III courts other than the Supreme Court.

For its part, the United States defends the constitutionality of the PLRA, echoing and elaborating upon the arguments set forth by defendants. The United States acknowledges that an extreme reading of the PLRA might raise very serious constitutional problems, but argues that the court should read the statute in a way that avoids these problems. In particular, the United States urges a less stringent and restrictive interpretation of what satisfies the requirement that the district court find a "current and ongoing violation of the Federal right," as that phrase is used in §3626(b)(2). According to the government, this finding would be permissible where the "proximate effects" of a past constitutional violation have not been remedied, as well as where an imminent threat of recurrence of a violation of federal rights exists.

IV. Should the Court Reach Issues Regarding the Constitutionality of the PLRA in Deciding the Motions Now Before the Court?

A. The Desire of All Parties for Immediate Decisions on Constitutionality

All parties appearing and filing submissions before the court on the pending motions have expressed agreement that the court should, perhaps even must, decide forthwith, on the merits, plaintiffs' challenge to the constitutionality of the PLRA. The appearance of agreement is illusory, however, because each party is asserting that the constitutional challenge should be decided immediately in its favor.

At a hearing on November 27, 1996, the court called attention to the fact that some

of the submissions described the defense motions now pending as requests "to terminate all prospective relief," but that one submission in particular, that of the Commissioner, described the defense motions as requests "to vacate the consent decree." The court observed, however, that ordinarily a sharp contrast exists between vacating a judgment (or decree) and merely modifying it by terminating one or more of its provisions regarding relief for a breach of duty or violation of a right. The court further suggested that interpreting the PLRA to require only termination of any prospective relief contained in the Consent Decree, instead of vacating the entire decree (including the adjudications contained therein), would avoid constitutional problems.

The court then inquired, "Is there a material difference between terminating some provisions and vacating the entire decree in this case?" A surface appearance of agreement among the parties might be inferred from the unwillingness of any party to argue for an affirmative answer to this question. Deeper probing, however, suggests that the more likely explanation is again the understandable desire of each party to have all constitutional challenges decided immediately in its favor, and the understandable views of all counsel that they best serve their respective clients' interests by taking this position.

Defendants, for example, pointing to the definition of "prospective relief" set forth in the PLRA ("'prospective relief' means all relief other than compensatory monetary damages"), argue that terminating such relief would require vacating the Consent Decree, because, in the words of the submission on

behalf of the Commissioner, "[i]n entering the decree, the Court itself makes no adjudication beyond approval of the decree" (Supplemental Memorandum of the Commissioner in Support of His Motion to Vacate the Consent Decree, at 5).

After taking an opportunity for reflection offered by the court at the hearing of November 27, 1996, plaintiffs informed the court in a later submission that, in their view, because terminating all prospective relief would be interpreted by defendants as ending the defendants' obligation to maintain single-cell occupancy, a court order termination all prospective relief will as a practical matter cause plaintiffs to lose "rights secured to them by the decree." Therefore, plaintiffs argue, the court must either make the findings required by the statute and order that narrowly tailored prospective relief remains in effect or confront the constitutional issues posed by the PLRA.

The attorney for the United States, as intervenor, stated that "all prospective relief" appears to encompass the entire Consent Decree, and has suggested that any declaratory relief is included within the meaning of prospective relief; the government, however, has declined to take a position on whether the court should vacate the decree in ruling on the motions now pending.

B. Elements of Judgments, Decrees, Consent Decrees, and Orders in Aid of Enforcement

In paradigm tort and contract cases brought by two or more plaintiffs, judgment for plaintiffs is simply an award of money,

damages, with costs, and prejudgment and post-judgment interest in appropriate cases (though ordinarily not when the only defendant is a government entity that is immune from an award of interest). If the judgment is not satisfied, orders in aid of enforcement (such as attachments, garnishment, or orders for discovery aimed at identifying non-exempt assets) are made not as a part of the judgment or as a modification of it but as separate orders. The judgment remains intact, even if not satisfied before a time limit bars enforcement proceedings. Even after enforcement proceedings are barred, the judgment may have significant consequences, through claim preclusion, issue preclusion, and in other ways.

In the exceptional breach-of-contract case in which specific performance (a form of prospective relief) is decreed, a later modification of the decree terminating the order of specific performance would by no means be equal to vacating the decree. The adjudication of breach would remain in force, absent an explicit order vacating the decree rather than just modifying it by terminating the provisions for specific performance.

Thus, defendants' argument that the PLRA's prescription for terminating prospective relief is equivalent to a prescription for vacating any consent decree containing a provision for prospective relief is without support in the large body of precedent that was part of the historical context in which the PLRA was enacted. To read the statute as the defendants would have the court read it would require a finding that Congress acted without consideration for, or in abrogation of, this body of

precedent, and would raise troubling questions of the statute's constitutionality.

C. Should Constitutional Challenges to the PLRA Be Decided in Ruling on Motions Pending in this Case?

Courts must examine the text of the relevant provisions of the PLRA to determine their meaning as bearing on the relationship between terminating prospective relief and vacating a consent decree. Before turning to that task, a court may appropriately, and perhaps even must, take note of precedents bearing upon justiciability and prudential constraints against prematurely addressing constitutional issues that may be mooted by an interpretation of the statute that is at least one of the possible interpretations likely to be adopted by higher courts (in this instance, by the Court of Appeals for the First Circuit or the Supreme Court).

When two or more equally plausible interpretations of statutory text are advanced by the parties to a case and one of the clashing interpretations presents serious constitutional problems, a trial court should adopt the interpretation that avoids constitutional issues unless a contrary manifestation of Congressional intent appears elsewhere in the context of the legislation. See DeBartolo v. Florida Gulf Trades Council, 485 U.S. 568, 575 (1988). As the Supreme Court stated in DeBartolo:

> This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the

> Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.

Id. at 575 (citation omitted).

Applying this basic principle of constitutional adjudication, I conclude that construing the language "termination of all prospective relief" as requiring that the entire Consent Decree in this case and every adjudication within it be vacated would raise very serious constitutional problems indeed. A confirmation that serious and divisive constitutional problems would be presented by this interpretation appears in a split that has already developed regarding the constitutionality of several provisions of the PLRA. Compare Plyler v. Moore, 1996 WL 659352 (4th Cir. Nov. 14, 1996)(upholding the termination provisions of the PLRA against constitutional challenge), and Benjamin v. Jacobson, 1996 WL 413722 (S.D.N.Y. July 23, 1996) (same), with Hadix v. Johnson, 933 F. Supp. 1362 (W.D. Mich. 1996)(holding that automatic stay provision of the PLRA violated separation of powers principle), and Gavin v. Ray, 1996 WL 622556 (S.D. Iowa Sept. 18, 1996)(applying reasoning of Hadix to provision in PLRA authorizing termination of all prospective relief). Other courts, however, have construed the language of the PLRA in such a way as to avoid addressing possible constitutional problems. See Coleman v. Wilson, 933 F. Supp. 954, 957 n.7 (E.D. Ca. 1996); Madrid v. Gomez, 940 F. Supp. 247, 254 n.12 (N.D. Ca. 1996).

I conclude that an alternative and entirely reasonable interpretation of the

meaning of "termination of all prospective relief" avoids a conflict between the statute and a constitutional principle of separation of powers.

D. Meaning of "Prospective Relief"

To determine whether the PLRA should itself be interpreted as using the phrase "termination of prospective relief" as equivalent to "vacating" any consent decree containing prospective relief as one of its elements, courts are directed by precedent to first examine the text of the statute itself. Cf., e.g., Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985). Moreover, a general guideline of statutory interpretation is that statutory terms must be read in the context of the entire act and in relation to each other. See, e.g., King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991).

A key element of the manifestation of Congressional intent in this case is found in the statute's repeated and manifestly purposeful use of the word "prospective." That "prospective relief" has a more specific meaning than "judgment" or "decree" is suggested by the presence of separate definitions in the PLRA for the term "prospective relief" and for its root element, "relief." See §3626(g)(7) and (9).

One may hesitate about accepting the inference that the distinction between "judgment" and "prospective relief" is made in the statute, however, because of the statutory definition of "prospective relief" as "all relief other than compensatory damages." 18 U.S.C. §3626(g)(7). Two points join to overcome this hesitation.

First, a "judgment" or "decree" consists of more than just a declaration of "relief," in money damages or in some other form. It includes also an adjudication of a breach of some legally recognized duty or violation of some legally protected right, or a consent or agreement in lieu of litigating all the way to an adjudication.

Second, when a modified judgment or decree memorializes something already done before the date of final modification, one would not ordinarily think of that formal memorialiation as "relief." It was, instead, a prelude to the relief, and ordinarily as essential adjudication or a consent that made adjudication unnecessary. Thus, the "judgment" or "decree" consists of more than just orders of "relief."

Lawmaking cannot erase the reality of this distinction. The most that lawmaking can do is to declare the distinction immaterial to outcome in a particular context. And if a statute is interpreted as declaring this distinction immaterial to whether a previously entered consent decree is to be vacated, a serious issue of constitutionality is presented.

Despite the reality that this distinction exists, regardless of what a particular law says about its legal effect, the statutory definition of "consent decree" in the PLRA, at first blush, might be thought to favor the contention that terminating "prospective relief" requires vacating the entire "judgment" or "decree" of the court. The statutory definition of "consent decree" is "all relief in any form that may be granted or approved by the court...." §3626(g)(1).

Closer examination of the entire text of the statute, however, rebuts this interpretation. One reason is that this interpretation is hard to square with the phrase that follows in the definition of consent decree: "but does not include private settlement agreements." Id. (emphasis added). The force of this point is limited, however, by the definition of "private settlement agreement" as meaning "an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled." 18 U.S.C. §3626(g)(6).

Of greater force as bearing on this issue of statutory interpretation is the point stated above that ordinarily a "judgment" or "decree" that is in the form of a "consent decree" is still an adjudication of an ongoing obligation based on a claim of "violation of a Federal right" that was at least one part of the subject matter of the civil action in which the Consent Decree was entered. That adjudication may still have pragmatic consequences even after the prospective relief that had earlier been included in the Consent Decree has been terminated. Those consequences might include an entitlement to an award of monetary relief even if specific performance is not available. Also, an adjudication of a past violation of a federal right might still have significant practical consequences in other ways. Not the least of these ways is that officials of other branches of government ordinarily respect and abide by adjudications of a court, even when they question the power or authority of the court to specifically enforce its orders and even while officially asking the court or a higher court to modify or vacate its adjudications.

I need not and do not at this time undertake to determine whether an award of monetary damages might later be made in this case. That issue is among the issues that might raise constitutional concerns depending on circumstances yet to develop. It is among the issues not ripe for adjudication at this time.

Some confirmation of the meaning of "relief" as focusing on forms of remedies rather than being synonymous with "judgment" or "decree" appears in customary nonstatutory definitions. For example, relief is defined by the standard legal dictionary as:

> Deliverance from oppression, wrong, or injustice. In this sense it is used as a general designation of the assistance, redress, or benefit which a complainant seeks at the hands of a court, particularly in equity. It may be thus used of such remedies as specific performance, injunction, or the reformation or rescission of a contract.

Black's Law Dictionary, 1161 (5th ed. 1979). Relief is thus defined as a type of remedy. "Remedy," in turn, is defined as "[t]he means employed to enforce a right or redress an injury, as distinguished from right, which is a well founded or acknowledged claim." Id. The distinction between a right or a judgment and the means employed in aid of it, suggested by these definitions, is clarified by the addition of the word "prospective," which is defined by Black's as "looking forward; contemplating the future." Id. Thus, ordinary usage confirms a distinction between, one the one hand, "relief" and

"prospective relief" and, on the other hand, the judgment or consent decree itself.

E. Terminating Prospective Relief, as Distinct From Vacating the Judgment

As explained above, I do not accept the proposition asserted by various parties that this case involves only injunctive relief included in a consent decree that was merely approved by the court without any other form of adjudication.

Even assuming, without deciding, that earlier interlocutory adjudications may be wiped out by a consent decree in some circumstances, this is not such a case. The initial Consent Decree recited an agreement, approved by the court, that the decree "sets forth a program which is both constitutionally adequate and constitutionally required." See Part I, above. Like other aspects of the Consent Decree, this provision has been modified by later orders made in conformity with the standards for modification of consent decrees prescribed by the Supreme Court. For example, more than a decade after the original decree had been entered, the court, on March 31, 1993, made the following findings: 1) that "the current sustained rise in the inmate population was not foreseen" (Memorandum and Order of March 31, 1993, at 16); 2) that "the single-bunking requirement was a significant objective of the consent decree" and that the plaintiffs would not have consented to the decree if the requirement had not been included (id. at 17); 3) that "double-bunking would substantially increase the risk of violence in the cells under their current design (id.); 4) that "the risk of infectious diseases would be exacerbated by double-

bunking" (id. at 18); and 5) that the Sheriff's financial constraints alone did not constitute a sufficient reason for modifying the Consent Decree to allow the Sheriff to double-bunk in 197 cells (id. at 19-21).

The court later found that the unforeseen increase in inmate population did warrant modification of the Consent Decree, but in doing so, the court also concluded that double-bunking in more than 100 cells would not comport with the objectives of the Consent Decree (Memorandum and Order of January 25, 1994 at 5-6). Among other reasons stated for this determination was the effect that double-bunking throughout the facility would have on all other circumstances bearing upon adequacy of health care, opportunities for reasonable exercise and recreation, and other services of the institution as a whole. The final Memorandum noted that inmate population of a magnitude requiring more extensive double-bunking might present a serious constitutional issue (Memorandum and Order of June 14, 1994 at 12). These determinations, among others, represent judicial determinations regarding the rights and duties of the parties that are distinct from the relief ordered as remedies.

V. Distinctions Between the Statutory Interpretation Chosen and Those Urged by the Parties

The path of statutory interpretation adopted by the court, if accepted on appeal, avoids constitutional confrontation. It is a path distinct from those urged by the parties. Explicitly, I do not conclude that defendants' interpretation of the PLRA's termination provisions would comport with constitutional principles. Also, however, this court has not made and does not now make

the findings required under §3626(a) or (b) to keep in force prospective relief, as plaintiffs have urged.

In its previous decisions rejecting some proposed modifications of the Consent Decree and accepting others, the court was acting before the mandate of the PLRA was enacted and, necessarily, was applying the wholly different standards defined by Fed. R. Civ. P. 60(b) and the Supreme Court's directive in Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 365 (1992).

Plaintiffs urge, in the alternative, that the court should now make the findings under §3626(b)(2) of current or ongoing violations of a federal right and should decide that the Consent Decree, as modified, is narrowly tailored to the least intrusive means of providing a remedy for those violations. In rejecting this alternative contention I am guided by the principles of justiciability and prudential concern about unnecessarily reaching constitutional issues. At present, no evidence is before the court to support findings that defendants are not in compliance with the terms of the modified Consent Decree.

Plaintiffs argue that the only reason for the defendants' current state of compliance is the force of the Consent Decree and the threat of contempt for noncompliance. They argue that the court should make findings that noncompliance will occur if the Consent Decree is vacated, or even its provisions for prospective relief are vacated, and will lead to conditions of confinement in violation of constitutional standards. The United States urges a similarly broad interpretation of §3626(b)(2), arguing that the finding of

threatened recurrence of a constitutional violation would satisfy the statutory requirements.

All these arguments, however, are arguments for predictive findings about future conditions. Predictive findings would necessarily be made, even after a full evidentiary hearing, with a degree of uncertainty about whether they would turn out to be correct. The wiser course is to decline to decide the merits of such predictive contentions about threatened violations that may never occur. Cf. Mass. Ass'n of Afro-Americans Police v. Boston Police Dep't., 973 F.2d 18, 20 (1st Cir. 1992)(where a dispute involves "uncertain and contingent events that my not occur as anticipated, or indeed may not occur at all," the case is not fit for review). This point is especially apt where difficult constitutional questions are at stake.

VI. A Narrow Constitutional Ruling in the Alternative

All parties and the United States as intervenor, though they differ as to whether the relief contained in a consent decree is an element of a final judgment, and thus immune to retroactive legislative interference, have acknowledged that, under Plaut, Congress may not act to set aside a final judgment of an Article III court. If this court were to interpret the statute as making defendants' request the equivalent of a request to set aside the court's judgments contained in the various orders granting the prospective relief, that interpretation would present a serious constitutional issue.

Precisely the same order on the pending motions that is appropriate under the

statutory interpretation explained in preceding parts of this opinion is also appropriate on another ground that does involve determining one aspect of plaintiffs' constitutional challenges. In order to avoid delay in final resolution of the motions now pending before this court in the event a higher court rejects the statutory interpretation proposed above, I proceed to that narrow constitutional issue.

Consider, as an example, one aspect of the Consent Decree in this case, as last modified. Before enactment of the PLRA, this court had denied defendants' requests for a modification of the Consent Decree to delete female members from the plaintiff class or in some other way allow them to be housed in conditions below the standards set in the Consent Decree.

The parties then negotiated, entirely without consultation with the court, for a temporary agreement under which female members of the plaintiff class were held in a facility in the Suffolk County Courthouse rather than the Nashua Street Jail. Later they reached an agreement for holding female members of the class elsewhere, under terms and conditions that satisfied class counsel as effecting equal treatment for the female detainees.

Had the parties not asked the court's approval, this agreement might have been determined to be what the PLRA refers to as a "private settlement agreement[]." The PLRA also provides, however, that a "private settlement agreement" is not enforceable in the usual way, as in a civil action for damages. Instead, the statute allows, as the only remedy for breach of a "private settlement agreement," after the effective

date of the PLRA, that plaintiffs could elect to have their constitutional claims reopened and litigated under the constraints of the new Act. See 18 U.S.C. §3626(g)(6).

In this instance, however, the parties reported their agreement to the court, asked the court's approval, and the court did approve the agreement as another modification of the Consent Decree.

Compare the statutory treatment of rights of inmates under a "private settlement agreement" (as defined in the PLRA) with the treatment of the adjudicated rights of members of the plaintiff class in this case, as declared in this court's Final Order of June 14, 1994:

> (2) The Inmates and the Sheriff having filed a joint proposal with respect to housing female detainees, and no other party having objected at the hearing of June 14, 1994, the Sheriff's action in complete accordance with their agreement as recited below will be permitted, commencing immediately.
>
> AGREEMENT
>
> A. The Sheriff shall not use the so-called "House of Detention" or the "City Prison" in the Suffolk County Courthouse to hold Suffolk County pretrial detainees.
>
> B. If the Sheriff determines that to hold all the Suffolk County pretrial detainees committed to his custody the

use of a building or buildings in Suffolk County, other than the Nashua Street Jail is required, he shall provide written notice to counsel for the inmates of that determination. Except in the case of an emergency, such notice shall be delivered to counsel for the inmates at least thirty (30) days prior to beginning use of such building or buildings. In an emergency situation the Sheriff shall provide such reasonable notice to counsel for the inmates as the circumstances permit.

C. The Sheriff may hold Suffolk County female pretrial detainees at a unit or units located at the Suffolk County House of Correction designated for that purpose. If the Sheriff does so, the cells at the Nashua Street Jail used to house Suffolk County female pretrial detainees shall be used as single occupancy cells to hold Suffolk County male pretrial detainees. Suffolk County female pretrial detainees at the Suffolk County House of Correction shall be held in twenty-six (26) cells as follows. Each of the twenty-six (26) cells shall first be assigned one occupant. After one occupant has been

> assigned to each of the twenty-six (26) cells, an additional Suffolk County female pretrial detainee may be assigned to twelve of the cells, such that, at a maximum, thirty-eight (38) Suffolk County female pretrial detainees are being held, fourteen (14) in single occupancy cells and twenty-four (24) in double occupancy cells. Suffolk County female pretrial detainees in excess of thirty-eight (38) shall be transferred to other facilities as provided for under Massachusetts law. Suffolk County female pretrial detainees held at the Suffolk County House of Correction shall have the benefit of all programs currently available to detainees at the Suffolk County Jail. Suffolk County female pretrial detainees held at the Suffolk County House of Correction shall also have the benefit of and shall jointly participate in those programs which are available to female prisoners at the Suffolk County House of Correction, except for pre-release and release programs for which pretrial detainees are not eligible.

In this agreement, the Sheriff undertook ongoing obligations with respect to the treatment of female members of the plaintiff class. The continued recognition of these

obligations has significant practical value to these members of the class even after their entitlement to orders of specific performance is terminated. The effect of the PLRA, unless construed to preserve these obligations (as proposed in earlier sections of this opinion), would be to set aside by statutory directive a final judgment of a court. This would be the most serious intrusion on the separation of powers of any of the various alleged intrusions plaintiffs have challenged. For the same reason, it would be the strongest ground for a holding of unconstitutionality.

That holding, however, would be a narrow and limited one. All that need be held at this time, before predicted events of violations of adjudicated federal rights have occurred, it that, on constitutional grounds concerned with separation of powers, the statute not be enforced to the extent that it is interpreted as supporting defendants' contention for vacating judgment or vacating the adjudication of defendant's obligation to comply with their agreement (even though the threat of specific enforcement of orders to comply, backed up by contempt power of the court for noncompliance, is terminated).

As an alternative ground of decision, should my interpretation of the statute be rejected, I conclude that the ruling of unconstitutionality in this limited respect supports the order made below. See Plaut v. Spendthrift Farm, Inc., 115 S. Ct. at 1450, 1452, 1463 (stating the question presented in that case to be whether a section of the Securities and Exchange Act at 1934, "to the extent that it requires federal courts to reopen final judgments in private civil actions" under another section of the Act, "contravenes the Constitution's separation of

powers or the Due Process Clause of the Fifth Amendment," id. at 1450, and answering on the "narrower ground," id. at 1452, that the challenged section of the statute "is unconstitutional to the extent that it requires federal courts to reopen final judgments entered before its enactment," id. at 1463).

I do not suggest that the rights of the members of the plaintiff class in this case present as clear a case for application of this principle of separation of powers as did the rights of the claimants in Plaut, as evaluated in the concurring opinion of Justice Breyer. See id. at 1463-66 (Breyer, J., concurring). One reason is that, unlike the statutory provision in Plaut, id. at 1463, this one is not exclusively retroactive in effect. Indeed, it is most prospective, except as it applies to consent decrees entered before its effective date. On balance, however, I conclude that this fact does not insulate it from the narrow challenge that it offends the principle of separation of powers to the extent that it is interpreted as having retroactive effect to reopen consent decrees entered before its enactment. Also, though in less striking degree than the statutory provision at issue in Plaut, if interpreted to abrogate not only prospective relief but as well the underlying consensual obligations that have value even if no longer subject to enforcement by orders of specific performance, the statutory provision at issue here does lack "liberty-protecting assurances that prospectivity and greater generality," id. at 1465, of a statutory mandate might have provided. To the extent that this statute is interpreted as abrogating obligations and not merely withdrawing a form of relief in aid of fulfillment of those obligations, it becomes

an attempt to accomplish the desired results not "by rules of general applicability" but by "specify[ing] the people upon whom the sanction it prescribes is to be levied," id. at 1464 (quoting United States v. Brown, 381 U.S. 437, 461 (1965)).

VII. Other Requests

Based on other provisions of the PLRA or on Fed. R. Civ. P. 60(b), both the Sheriff and the Commissioner make alternative arguments for the court's vacating the Consent Decree. The Sheriff argues that the court's Final Order constitutes a "prisoner release order" within the meaning of the PLRA because the order that the Sheriff may not double-bunk inmates in more than 100 cells, without first filing a motion and supporting proof, has the "effect of reducing or limiting the prison population." 18 U.S.C. §3626(g)(4). Under the PLRA, a "prisoner release order" may be entered only by a three-judge panel after a finding by that panel that crowding is the primary cause of the violation of a federal right and that no other relief would remedy the violation. 18 U.S.C. §3626(a)(3).

This, however, is an attempt at labeling rather than facing substantive issues on the merits. This court has not made any order for prisoner release and is not doing so now. If orders for prisoner release are sought, they are more likely to be heard and decided by courts of the Commonwealth of Massachusetts than by this court.

The Commissioner's argument that the Consent Decree should be vacated under Fed. R. Civ. P. 60(b) because of changed circumstances is rejected for lack of a supporting proffer sufficient to invoke the

procedures available under the Final Order in this case. The Commissioner argues that the affidavits and reports filed show no increase in the incidence of assaults and disease due to the modification to allow 100 double-bunked cells. According to the Commissioner, these reports are evidence that the constitutional violation has been totally remedied. Moreover, the Commissioner argues, the defendants' good faith compliance with the Consent Decree since the opening of the Nashua Street Jail and the enactment of the PLRA also support a finding by the court of changed circumstances (changed implicitly to "good faith compliance" from some circumstance that someone at least, if not defendants, might believe to be other than "good faith compliance") that would warrant vacating the decree.

The changes in law incident to enactment of the PLRA have been fully considered and taken into account in this opinion. The Commissioner's other arguments for a finding of change of circumstance are not persuasive. The proffers of evidence fail to show a significant change in factual circumstance after the entry of the Final Order of June 14, 1994, and, as well, fail to show any attempt to tailor narrowly a proposed modification to conform with Rule 60 and the Supreme Court's guidance for precisely this case.

VIII. Conclusion

The appealability of one or more of the decisions explained in this opinion is a matter for decision of a higher court, rather than this court. To avoid any impediment to appealability, however, by reason of the method of formal filing of this opinion, the rulings on the motions, and the resulting

order, the court directs that the Clerk enter on a separate document an Order in accordance with this opinion.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Plaintiffs

v.

CIVIL ACTION
NO. 71-162-REK

SHERIFF OF SUFFOLK COUNTY, et al.,
Defendants

ORDER
January 2, 1997

For the reasons stated in the opinion of this date, it is ORDERED:

(1) The Motion of the Sheriff of Suffolk County to Terminate All Prospective Relief Within the Meaning of and Pursuant to 18 U.S.C. §3626(b)(2) (Docket No. 375) is

(a) GRANTED to the extent that the obligations placed on defendants under the Consent Decree as last modified, under paragraphs (1) and (2) of the Final Order of June 14, 1994, will no longer be enforced by an order of specific performance;

(b) DENIED to the extent that it requests that the court terminate the obligations stated in the modified Consent Decree and paragraphs (1) and (2) of the Final Order of June 14, 1994, as the consensual undertakings of the defendants with court approval, and to the extent that it requests that the

entire modified Consent Decree be vacated.

(2) Defendant Commissioner of Correction's Motion to Vacate Consent Decree (Docket No. 378) is DENIED, but with the clarifying provision that termination of enforcement by an order of specific performance has been effected as stated in paragraph 1(a) of this Order.

_____

United States District Judge

FILED
MAY 21 1998
OFFICE OF THE CLERK

No. 97-1278

In the Supreme Court of the United States

OCTOBER TERM, 1997

INMATES OF SUFFOLK COUNTY JAIL, ET AL.,
PETITIONERS

v.

RICHARD ROUSE, SHERIFF, SUFFOLK COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the requirement in 18 U.S.C. 3626(b)(3) (Supp. II 1996) that prospective relief should not be terminated under 18 U.S.C. 3626(b) (Supp. II 1996) when the relief remains necessary to remedy a violation of federal law requires a district court to consider whether a defendant may violate federal law in the future if the decree is terminated.

2. Whether 18 U.S.C. 3626(b) (Supp. II 1996) violates separation-of-powers principles or deprives petitioners of due process of law.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1278

INMATES OF SUFFOLK COUNTY JAIL, ET AL.,
PETITIONERS

v.

RICHARD ROUSE, SHERIFF, SUFFOLK COUNTY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 129 F.3d 649. The opinion of the district court (Pet. App. 32a-68a) is reported at 952 F. Supp. 869.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1997. The petition for a writ of certiorari was filed on February 4, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1971, a class of pre-trial detainees (petitioners) filed suit in federal district court, challenging overcrowded conditions at the Charles Street Jail in

Boston, Massachusetts. Pet. App. 33a. In 1973, the district court found that conditions at the jail violated the due process rights of pretrial detainees. *Ibid.* The court entered an injunction against double-bunking at the jail, and set a date after which no pretrial detainees could be held at the jail. *Ibid.* In 1979, the parties entered into a consent decree that required the County to close the old jail and build a new one meeting specified standards. *Id.* at 34a.

In 1985, the district court modified the consent decree to allow the County to increase the capacity of the new jail provided that single-cell occupancy was maintained. Pet. App. 34a-35a. In 1989, the County sought to modify the decree to allow double occupancy of cells. The district court granted a limited modification that left in place the single-cell requirement, and the court of appeals affirmed. *Inmates of Suffolk County Jail* v. *Kearney*, 915 F.2d 1557 (1st Cir. 1990) (Table). This Court vacated and remanded for a determination of whether there was a significant change in the law or the facts that would justify modification of the decree. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367 (1992).

On remand, the district court denied the motion to modify the decree. See *Inmates of Suffolk County Jail* v. *Rufo*, 148 F.R.D. 14 (D. Mass.), aff'd, 12 F.3d 286 (1st Cir. 1993). In 1994, however, the district court modified the decree to allow double occupancy in 100 cells as long as certain conditions were met. Pet. App. 36a-37a. The 1994 order also contemplated that the case would be "finally closed" in 1999. *Id.* at 38a-39a.

2. In June 1996, the County moved to terminate the prospective relief in the consent decree under the Prison Litigation Reform Act of 1995, Pub. L. No.

104-134, Title VIII, §§ 801-810, 110 Stat. 1321-66 to 1321-77 (PLRA). Pet. App. 39a. In the PLRA, Congress altered the standard for the entry of prospective relief in prison conditions cases involving consent decrees. See 18 U.S.C. 3626(c)(1) (Supp. II 1996). Under the PLRA, such relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. 3626(a)(1)(A) (Supp. II 1996). Section 3626(b)(2) provides for the immediate termination of relief that does not comply with that standard. It specifies that "[i]n any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. 3626(b)(2) (Supp. II 1996). At the time of the decisions below, relief could nonetheless be continued if the court made written findings based on the record that "prospective relief remains necessary to correct a current or ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation." 18 U.S.C. 3626(b)(3) (Supp. II 1996). Congress has since amended Section 3626(b)(3) to permit the continuation of relief only when a court makes findings of a "current and ongoing violation." Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, Tit. I, § 123(a)(2), 111 Stat. 2470. A party may seek termination under Section 3626(b) even if the

relief "was originally granted or approved before * * * the date of the [PLRA's enactment]." PLRA, § 802(b)(1), 110 Stat. 1321-70.[1]

Petitioners opposed the County's motion, arguing that the PLRA's termination provisions are unconstitutional and that, in any event, there was a continuing violation warranting preservation of the existing relief. Pet. App. 42a. The United States intervened in the case, pursuant to 28 U.S.C. 2403(a), to defend the constitutionality of the PLRA. Pet. App. 32a-33a, 44a.

3. The district court granted the County's motion in part. The court held that its past findings did not satisfy the standards set forth in Section 3626(b)(2), and that there was no evidence of a current constitutional violation. Pet. App. 55a-56a. Based on those determinations, the court ordered that the decree "will no longer be enforced by an order of specific performance." *Id.* at 67a. The court refused, however, to "terminate the obligations" in the decree. *Ibid.* The court held that the Act did not require terminating the obligations themselves, and that if the Act were construed to require such termination, it would violate separation-of-powers principles. *Id.* at 50a-64a. The court also declined petitioners' invitation to

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[1] Under 18 U.S.C. 3626(b)(1), all decrees, including those entered with the necessary findings, are also subject to periodic review to determine whether they remain necessary to remedy a constitutional violation. Section 3626(b)(1) provides for such review two years after the entry of relief, one year after a denial of a motion to terminate, and, in the case of pre-PLRA decrees, two years after the date of enactment. 18 U.S.C. 3626(b)(1) (Supp II 1996). In April 1998, pre-PLRA decrees, like the one at issue in this case, became subject to periodic review.

make a predictive judgment about whether the County might violate the law in the future. *Id.* at 56a-57a.

4. The court of appeals affirmed in part and modified in part. Pet. App. 1a-29a. The court first held that a consent decree that fails to meet the PLRA standards must be terminated. *Id.* at 7a-10a. The court explained, however, that the decree need not be vacated. *Id.* at 27a-28a.

The court of appeals also rejected petitioners' constitutional challenges to the PLRA. The court held that applying the PLRA termination provisions to a preexisting decree does not violate the principle announced in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), that Congress may not reopen final judgments. Pet. App. 11a-12a. The court concluded that, under *Plaut* and *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), "although a judgment at law is impervious to legislative assault, a forward-looking judgment in equity can succumb to legislative action if the legislature alters the underlying rule of law." Pet. App. 12a-13a. The court noted that the PLRA altered the relevant underlying law by "divest[ing] district courts of the ability to construct or perpetuate prospective relief when no violation of a federal right exists." *Id.* at 14a. "Given this shift in the relevant underlying law," the court concluded, "the termination of prospective relief pursuant to the PLRA does not amount to a legislative reopening of a final judgment." *Ibid.*

The court of appeals also held that the PLRA does not mandate a rule of decision in violation of the principle established in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). Pet. App. 14a-16a. The court explained that "the PLRA does not run afoul of

Klein because * * * courts remain free to interpret and apply the law to the facts as they discern them." *Id.* at 16a.

The court of appeals held that Section 3626(b) does not violate the Due Process Clause. Pet. App. 16a-20a. The court concluded that "frankly modifiable decrees cannot create vested rights." *Id.* at 17a. The court further held that Section 3626(b) "survives rational basis scrutiny," because it "forges a practical, commonsense linkage between a changed circumstance—the district courts' newfound inability to grant or enforce prospective relief absent a violation of a federal right—and an existing consent decree." *Id.* at 20a.

Finally, the court of appeals rejected petitioners' contention that relief should be continued under Section 3626(b)(3) based on the possibility that the County might violate the law in the future. Pet. App. 25a-27a. The court of appeals agreed with the district court that petitioners' argument rested upon an "inherently speculative claim of harm to come." *Id.* at 27a. The court added that "[i]f, in this instance, the [petitioners'] trepidation proves justified, they remain free to initiate a new round of proceedings designed to show that post-termination prison conditions actually do violate their federally protected rights." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 15-17) that the court of appeals erred in its construction of Section 3626 (b)(3). According to petitioners, even when existing conditions do not violate the Constitution, Section 3626(b)(3) requires a court to maintain an existing decree if its dissolution is likely to lead to a viola-

tion in the future. That contention does not warrant review.

At the time of the decisions below, Section 3626 (b)(3) provided that a decree should not be terminated if it remained necessary to remedy a "current or ongoing violation." 18 U.S.C. 3626(b)(3) (Supp. II 1996). After the court of appeals' decision, however, Congress amended Section 3626(b) to provide that a decree should not be terminated when it remains necessary to remedy a "current and ongoing violation." Pub. L. No. 105-119, Tit. I, § 123(a)(2), 111 Stat. 2470. The House Conference Report on the amendment states that the word "or" was changed to "and" in order to make clear that prospective relief should not be continued "on the basis of a claim that a current condition that does not violate prisoners' Federal rights nevertheless requires a court decree to address it, because the condition is somehow traceable to a prior policy that did violate Federal rights, or that government officials are 'poised' to resume a prior violation of federal rights." H.R. Conf. Rep. No. 405, 105th Cong., 1st Sess. 133 (1997). The question presented by petitioners (Pet. 15) concerns the meaning of Section 3626(b) prior to the amendment. Now that Congress has amended Section 3626(b), that question has no continuing importance.

Moreover, whatever the correct construction of Section 3626(b)(3), the PLRA does not withdraw a court's equitable authority to issue new relief (including emergency relief) to prevent a violation of federal rights. 18 U.S.C. 3626(a)(2) (Supp. II 1996). If petitioners have evidence that a violation of their rights is imminent, they are free to seek such relief. The courts below specifically left that option open. Pet. App. 27a, 57a. Petitioners provide no basis for

concluding that the alternative avenue for relief left open by the courts below would be inadequate in this case.

2. Petitioners also contend (Pet. 17-23) that Section 3626(b) is unconstitutional. As the court below concluded (Pet. App. 10a-24a), that contention is without merit. Four courts of appeals have reached the same conclusion. *Hadix* v *Johnson*, 133 F.3d 940 (6th Cir. 1998), petition for cert. pending, No. 97-1693; *Dougan* v. *Singletary*, 129 F.3d 1424 (11th Cir. 1997), petition for cert. pending, No. 97-8120; *Gavin* v. *Branstad*, 122 F.3d 1081 (8th Cir. 1997), petition for cert. pending, No. 97-7420; *Plyler* v. *Moore*, 100 F.3d 365 (4th Cir. 1996), cert. denied, 117 S. Ct. 2460 (1997).[2] And while a panel of the Ninth Circuit has recently held that Section 3626(b)(2) violates separation-of-powers principles, *Taylor* v. *United States*, Nos. 97-16069 & 97-16071, 1998 WL 214578 (May 4, 1998), that decision does not provide a basis for granting review in this case. This Court denied a petition in *Plyler* raising essentially the same constitutional questions presented by petitioners in this case, and there is no reason for a different outcome here.

a. Petitioners err in contending (Pet. 17-21) that Section 3626(b) violates the separation-of-powers principles set forth in *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). In *Plaut*, the Court held that Congress may not require federal courts to reopen final judgments dismissing claims for monetary re-

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[2] A panel of the Second Circuit upheld the constitutionality of Section 3626(b)(2), but construed that provision to bar only federal court enforcement of the decree. See *Benjamin* v. *Jacobson*, 124 F.3d 162, 170 (2d Cir. 1997). On December 23, 1997, the Second Circuit granted rehearing en banc in *Benjamin*.

lief. 514 U.S. at 218-219. *Plaut* did not suggest, however, that Congress is precluded from directing federal courts to modify *prospective* relief to the extent that such relief fails to conform to new legal standards. To the contrary, the Court reaffirmed its earlier decision in *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856), which it characterized as upholding Congress's power to "alter[] the prospective effect of injunctions entered by Article III courts." *Plaut*, 514 U.S. at 232. The critical difference is that, while a final judgment on a claim for monetary relief represents "the last word of the judicial department with regard to a particular case or controversy," *id.* at 227, an injunction is always subject to modification or termination in light of a "significant change either in factual conditions or in law," *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). Thus, as five circuits have concluded, Congress may not require courts to reopen final judgments on claims for monetary relief, but Congress may require courts to modify prospective relief in accordance with a change in the applicable law. *Hadix*, 133 F.3d at 942-943; *Dougan*, 129 F.3d at 1426; *Gavin*, 122 F.3d at 1085-1089; *Plyler*, 100 F.3d at 371-372; Pet. App 12a-14a.

As those courts have further concluded, Section 3626(b) falls on the constitutional side of that line. See *Hadix*, 133 F.3d at 943; *Dougan*, 129 F.3d at 1426-1427; *Gavin*, 122 F.3d at 1085-1089; *Plyler*, 100 F.3d at 372; Pet. App. 12a-14a. Section 3626(b) applies only to "prospective relief." 18 U.S.C. 3626(b) (Supp. II 1996). And Section 3626(b) requires a court to terminate such prospective relief only when the relief does not conform to Congress's new legal standard for awarding equitable relief in prison conditions cases. Prior

to the enactment of the PLRA, courts could enter a consent decree that provided for relief greater than that required by federal law. *Rufo*, 502 U.S. at 389. The PLRA alters judicial remedial authority in consent decree cases by providing that relief entered pursuant to a consent decree may "extend no further than necessary to correct the violation of the Federal right." 18 U.S.C. 3626(a) (Supp. II 1996). Consistent with *Plaut* and *Wheeling & Belmont Bridge*, Congress had authority to require district courts addressing motions to modify existing consent decrees to apply the PLRA's new remedial standard to such motions.

Petitioners contend (Pet. 19) that *Wheeling & Belmont Bridge* is distinguishable, because that case involved a change in the substantive rights of the parties, and Congress lacks authority to modify the underlying due process rights that prisoners seek to vindicate. That suggested distinction is unpersuasive. Although Congress lacks power to alter the scope of the Due Process Clause, Congress undoubtedly had authority to limit judicial remedial authority by precluding the entry of relief that is more extensive than necessary to remedy violations of the Due Process Clause. See *Yakus* v. *United States*, 321 U.S. 414, 441-442 & n.7 (1944) (upholding Congress's authority to restrict the remedial authority of courts and noting numerous instances in which Congress has exercised that authority). And, with respect to separation-of-powers principles, there is no constitutional difference between altering the court's remedial powers and altering the substantive law defining the rights of the parties. In sum, Section 3626(b) is fully consistent with the separation-of-powers principles set forth in *Plaut*.

b. Petitioners also contend (Pet. 20-23) that the PLRA unconstitutionally prescribes a rule of decision within the meaning of *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872). As explained by the Court in *Plaut*, 514 U.S. at 218, however, legislation does not prescribe a rule of decision within the meaning of *Klein* when it "amends applicable law" and leaves to the judiciary the task of interpreting that law and applying it to the facts. That is the situation here.

As noted above, prior to the enactment of the PLRA, a court could enter injunctive relief in a consent decree that extended further than necessary to remedy unconstitutional prison conditions. *Rufo*, 502 U.S. at 389. In enacting the PLRA, Congress has deprived district courts of that authority, and in so doing has amended the applicable law. At the same time, "courts remain free to interpret and apply the law to the facts as they discern them." Pet. App. 16a. Under the PLRA, relief may be terminated only when a court finds that the relief is more extensive than necessary to remedy a federal right. 18 U.S.C. 3626(b) (Supp. II 1996). As four circuits have concluded, *Klein* is therefore inapposite here. See *Hadix*, 133 F.3d at 943; *Gavin*, 122 F.3d at 1089; *Plyler*, 100 F.3d at 372; Pet App. 14a-16a; see *Dougan*, 129 F.3d at 1426 n.10 (not addressing *Klein* issue because it was not raised on appeal).

c. Petitioners also contend (Pet. 20-23) that Section 3626 violates the Due Process Clause. Injunctive relief, however, is always subject to modification or termination, and that principle is fully applicable to consent decrees. *Rufo*, 502 U.S. at 378. Thus, petitioners had no vested property interest protected by the Due Process Clause in the injunctive relief embodied in the consent decree. See *Landgraf* v. *USI*

Film Products., 511 U.S. 244, 273-274 (1994) (plaintiffs do not have a vested right in an injunctive decree); see also *Hadix*, 133 F.3d at 943 n.3; *Dougan*, 129 F.3d at 1427-1428; *Gavin*, 122 F.3d at 1090-1091; *Plyler*, 100 F.3d at 374. Moreover, as the court below explained (Pet. App. 20a), Congress's decision to provide for the termination of prospective relief that does not satisfy current legal standards was entirely rational and legitimate. See also *Hadix*, 133 F.3d at 943 n.3; *Gavin*, 122 F.3d at 1091. Petitioners' contention that the PLRA violates the Due Process Clause is therefore without merit.

d. After the judgment below was entered, and after the instant petition for certiorari was filed, a panel of the Ninth Circuit held that Section 3626(b) violates the separation-of-powers principles set forth in *Plaut* and *Klein*. *Taylor*, 1998 WL 214578, at *3-*5 (*Plaut*); *id.* at *8-*9 (*Klein*). The panel did not address the due process issue. *Id.* at *9.

Although the panel's decision in *Taylor* conflicts with the decision below and with the decisions in four other circuits, it does not furnish a ground for granting review in this case. The Solicitor General has authorized the filing of a suggestion for rehearing en banc in *Taylor*, and we have been informed that the State of Arizona also intends to seek en banc review. Because there is a reasonable possibility that the Ninth Circuit will grant en banc review in *Taylor* and eliminate the conflict in the circuits, see Ninth Circuit Rule 35-1, review by this Court at this time is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

NO. 97-1278

INMATES OF THE SUFFOLK COUNTY JAIL, et al.,
Petitioners,

vs.

RICHARD J. ROUSE, SHERIFF OF SUFFOLK COUNTY, et al.
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether this Court should decline to review the issues in this case as there appears to be no disagreement among the circuits.
2. Whether Section 3626(b)(2) of the Prison Litigation Reform Act presents any constitutional difficulties under separation of powers or due process principles.

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COUNTERSTATEMENT OF THE CASE

The Consent Decree at the center of the present dispute has had a long and contentious history. Entered into by the parties to this action in 1979, the Consent Decree remained in effect until terminated by Order of the First Circuit Court of Appeals on November 7, 1997, pursuant to the Prison Litigation Reform Act of 1996 (the "PLRA"). The decree remained in effect despite numerous changes in conditions including, most notably, the construction of a new, state-of-the-art Suffolk County Jail. The long history of this case illustrates the condition which Congress sought to remedy by enacting the PLRA.

This action was initiated in the United States District Court for the District of Massachusetts in 1971, on behalf of the inmates of the Suffolk County Jail. At that time, the Suffolk County Jail was located on Charles Street in the City of Boston and was known as the "Charles Street Jail." By 1971, the Charles Street Jail was an out-of-date, unfit facility. On June 20, 1973, the District Court determined that the then existing conditions at the Charles Street Jail were unconstitutional and permanently enjoined the Sheriff from, inter alia, "housing at the Charles Street Jail after November

30, 1973, in a cell with another inmate, any inmate who is awaiting trial." Inmates of Suffolk County Jail v. Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973).

The Consent Decree

In 1979, in order to comply with the Court's June 20, 1973 Order, the parties entered into a consent decree (the "Consent Decree") providing for the construction of a new high-rise jail adjacent to the Charles Street Jail.

The parties to the Consent Decree explicitly recognized the prospect of changing conditions and the continuing need to adapt to conform to current circumstances. The site for the jail was moved from Charles Street to Nashua Street and changed from a high-rise to a modern and spacious seven-story structure. The Nashua Street Jail was completed in May, 1990, at a cost of $54 million. It is one of the most modern penal facilities in the country, providing more amenities to inmates than most other state and county facilities. The Nashua Street Jail includes a variety of functionally distinct spaces to meet the special needs of inmates. There are 453 cells and each cell is approximately 70 square feet with 40 square feet of available floor space. This amount of floor space exceeds the

American Correctional Association's standard of 35 square feet. Each housing unit contains two tiers of sixteen to nineteen cells, a large "day room" where meals are served and detainees may spend their out-of-cell time, a separate "quiet" or "multi-purpose" room, counseling, noncontact visiting and attorney-client rooms, a washer and dryer for personal laundry, a kitchenette for serving meals prepared in the central kitchen, two televisions, exercise equipment, telephones for use by detainees and access to an outdoor recreation deck shared with the adjoining housing unit on the same floor.

The Nashua Street Jail also offers a contact visiting area, chapel, general library, classroom space for use by inmates, access to legal materials and a large central gymnasium complete with exercise equipment. Because of the modern, expanded facilities of the new Nashua Street Jail, visiting hours are permitted seven days a week, including holidays. All areas of the jail are climate-controlled.

From the very first day the new Nashua Street Jail was opened, in order to comply with the single bunking provision of the Consent Decree respecting the old Charles Street Jail, the

Sheriff was required to hold Suffolk County pretrial detainees in correctional facilities outside of Suffolk County. Every night, dozens of inmates were transferred to other facilities where they were double-bunked in conditions vastly inferior to those at the new Nashua Street Jail. In fact, these other facilities often exceeded their design capacity by as much as 200%.

A result of this federal court intervention, older and already overcrowded facilities in seven other counties were required to house a disproportionately higher number of inmates than the new Nashua Street Jail. Moreover, the Sheriff was forced to divert scarce financial and human resources to the transportation of detainees to facilities outside of Suffolk County each night.

On August 9, 1993, the Sheriff filed a Supplemental Memorandum in which he proposed double bunking in 161 cells in the new facility. Without subsidiary findings, the District Court found that the Sheriff's proposal was not "an appropriately tailored modification," but found, also without explanation, that a modification permitting double-bunking in 100 cells would not impair the integrity of the Consent Decree. In so doing, the District Court acknowledged that "[a] federal court . . . should be loathe to

become entangled in the intricacies of administrative and institutional decisions." Inmates of Suffolk County Jail v. Rufo, 844 F. Supp. 31, 37 (D. Mass. 1994).

On June 14, 1994, the District Court entered a Final Order which allowed a modification of the Consent Decree to permit 100 cells to be double-bunked. The Court explicitly found that such a modification "would be adequately tailored to fit the changed circumstances without reducing the consent decree to or below the constitutional floor." The Court did not identify the "constitutional floor" or explain the logic of any limitation of the number of double-bunked cells in the new facility.

The Nashua Street Jail has received certification from the Massachusetts State Building Code Appeals Board to hold 653 inmates. However, as a result of the June 14, 1994 District Court's Order, the Jail's capacity was reduced to 553 inmates.

The Prison Litigation Reform Act

On April 26, 1996, President Clinton signed into law the Prison Litigation Reform Act (the "PLRA"). The PLRA is intended to "provid[e] reasonable limits on the remedies available

in" lawsuits concerning prison conditions. See H.R. Rep. No. 21, 104th Cong., 1st Sess. 7 (1995).

Section 802 of the Act establishes standards for the entry and termination of prospective relief in civil actions concerning conditions in prisons, jails, and juvenile detention facilities. With regard to the entry of prospective relief, Section 3626(a)(1)(A) provides:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or petitioners. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

Section 3626(b)(2) provides for the immediate termination of any prospective relief that was entered without the findings required by Section 3626(a)(1):

> In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no

> further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

A court may decline to terminate prospective relief only if it has found that "prospective relief remains necessary to correct a current or ongoing violation of the Federal right." 18 U.S.C. § 3626(b)(3). No such finding has ever been made in this case.

The Proceedings Below

Pursuant to Section 3626(b)(2) of the PLRA, the Sheriff moved the District Court to terminate all prospective relief on the ground that the District Court had theretofore never made the required findings to sustain such relief with regard to the new Nashua Street Jail. In ruling on the Sheriff's motion, the Court acknowledged that it had "not made and does not now make the findings required under § 3626(a)(1) or (b)(2) to keep in force prospective relief, as petitioners have urged."

The District Court terminated the prospective relief imposed by the Consent Decree insofar as it may be characterized as a Court Order. Because the Court purported to preserve elements of the Consent Decree, at least for "contract" purposes, the Court determined that it did not have to address the constitutionality of

the PLRA's termination provision. All parties appealed the decision.

The First Circuit modified the judgment to require that the decree itself, and not simply the prospective relief imposed by the decree, be terminated. The Court held that the PLRA was constitutional in all respects and remanded the case to the District Court for entry of the modified judgment.

REASONS FOR DENYING THE WRIT

I. The Decision Of The First Circuit Court Of Appeals Is Not In Conflict With Decisions In Other Circuits.

The Petitioners acknowledge that the constitutionality of the PLRA has been upheld by no fewer than six separate Circuit Courts.[1] It can hardly be said, therefore, that the First Circuit's decision below creates a "real and embarrassing conflict of opinion and authority between the circuit courts of appeal" justifying review on certiorari. NLRB Pittsburgh S.S. Co., 340 U.S. 498, 502

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[1] See Hadix v. Johnson, Nos. 96-2463, 96-2582, 1998 U.S. App. Lexis 387 (6th Cir. 1998); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997); Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997), reh'g en banc granted, 124 F.3d 162 (2d Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996) cert. denied, ___ U.S. ___, 117 S.Ct.2460 (1997).

(1951)(quoting Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923)).[2]

The issues of federal law involved in this case have been settled by historic decisions of this Court confirmed by more recent precedent. See, e.g. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1856); Plaut v. Spendthrift Farms, 115 S.Ct. 1147 (1995). The First Circuit's decision in this case simply applies the law as expressed in those cases.

II. The PLRA Presents No Constitutional Difficulties under Separation of Powers or Due Process Principles.

A. The PLRA's Provisions for Termination Do Not Violate the Principle of Separation of Powers.

The separation of powers doctrine prohibits Congress from itself assuming the role assigned by the Constitution to the Judicial Branch. Congress may not decide cases. United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). It is the role of Congress, however, to create and structure the inferior courts, and to establish the confines of the jurisdiction of those courts. See U.S. Const. art. I, §

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[2] The Second Circuit has found the PLRA to be constitutional but originally concluded that the residual of any consent decree may be enforced in state court. Benjamin v. Jacobson, 124 F.3d 162,180 (2d Cir. 1997). The Circuit Court has recently ordered en banc reconsideration of the matter.

8, cl. 9; art. III, §§ 1-2; see also Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) ("[t]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States"). Congress not only establishes the substantive federal law to be applied by the courts, it has the constitutional authority to establish the procedural and evidentiary rules which apply in proceedings before the federal courts. "[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts." Hanna v. Plumer, 380 U.S. 460, 472 (1965).

1. A Consent Decree is Not a Final Judgment.

The petitioners argue that the First Circuit erred in not holding that Section 3626(b)(2) of the PLRA is unconstitutional because it mandates the reopening of a "final judgment" by requiring district courts to terminate consent decrees that were approved before the passage of the PLRA. In support, the petitioners rely on Plaut v. Spendthrift, 115 S. Ct. 1447 (1995).

In Plaut, this Court considered legislation that retroactively allowed petitioners in certain specific securities fraud suits to

revive actions that had been previously dismissed as a result of a statute of limitations rule first announced and applied by the Supreme Court in Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991). The Court in Plaut held that this legislation represented an attempt by Congress to "set aside the final judgment of an Article III court by retroactive legislation," 115 S. Ct. at 1458, and thus violated separation of powers principles. The Court explained that "[j]udgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government." Id. at 1456, quoting Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948).

Sections 3626(b)(2) and (b)(3) of the PLRA do not violate the principle announced in Plaut. Plaut involved lawsuits for monetary damages. In that context, the Court stated that "[h]aving achieved finality, . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to that very case was something

other than what the courts said it was." Plaut, 115 S. Ct. at 1457. Indeed, the Court in Plaut explained that its ruling was distinguishable from decisions approving statutes "that altered the prospective effect of injunctions entered by Article III courts."[3] Id. at 1459 (citing Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855)).

The basis for this distinction rests in the longstanding principles applicable to injunctive relief. Injunctions, in contrast to monetary judgments, have always been susceptible to modification as a result of changes in law or fact. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855); Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 384 (1992). In Wheeling & Belmont, this Court explained the dichotomy between the finality of judgments for monetary damages and judgments providing prospective relief. The Court explained:

> [I]f the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress . . . . But that part of

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[3]The Court noted that "[a]part from the statute we review today, we know of no instance in which Congress has attempted to set aside the final judgment of an Article III court by retroactive legislation." Plaut v. Spendthrift Farm, Inc., 115 S. Ct. at 1458.

> the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance. . . . If . . . this right has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction, it is quite plain that the decree of the court cannot be enforced.

Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421,431-432. See also United States v. Swift & Co., 286 U.S. 106 (1932); System Federation No. 91, Railway Employees' Department, AFL-CIO v. Wright, 364 U.S. 642 (1961) (Court held that statutory amendment permitting union shop agreements required modification of a prior consent decree); Plaut, 115 S.Ct. at 1459 (legislation may affect "the prospective effects of injunctions entered by Article III courts"); Rufo v. Inmates of the Suffolk County Jail, 502 U.S. 367, 393 (1992) (holding consent decree may be modified based on significant changes in facts or law); Class v. Norton, 507 F.2d 1058, 1061 (2d Cir. 1974) (holding that Wheeling created a "doctrine of judicial deference to legislative revision of a statute upon which a prospective court order is based"); Daylo v. Administrator of Veterans' Affairs, 501 F.2d 811, 817 (D.C. Cir. 1974) (judgment's prospective effects are not final for separation of power purposes).

Indeed, the several courts addressing this issue have similarly held that the PLRA does not offend separation of powers principles. Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996); James v. Lash, 965 F. Supp. 1190, (N.D. Ind., May 15, 1997); Jensen v. County of Lake, 958 F. Supp. 397 (N.D. Ind. 1997); Benjamin v. Jacobson, 935 F. Supp. 332 (S.D.N.Y. 1996).

2. The PLRA's Requirement that the Court Issue Findings Does Not Deprive the Courts of their Inherent Power and Duty to Enforce Effective Remedies in Constitutional Cases.

The petitioners contend that the PLRA violates the separation of powers doctrine by depriving the federal courts of their essential powers to enter equitable relief to remedy constitutional violations in a prison setting. The PLRA does no such thing. The PLRA merely requires that any prospective relief be accompanied by particularized findings that such relief is necessary to remedy an existing violation of a federal constitutional right, thus ensuring that continuing orders comport with current remedial standards as articulated by the courts. Milliken v. Bradley, 433 U.S. 267, 280 (1977) (The "remedy must therefore be related to 'the condition alleged to offend the constitution.'"); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971)

("[T]he nature of the violation determines the scope of the remedy"); see also McLendon v. Continental Can Co., 908 F.2d 1171, 1182 (3d Cir. 1990) ("In granting injunctive relief, the court's remedy should be no broader than necessary to provide full relief to the aggrieved plaintiff"); Ruiz v. Estelle, 679 F.2d 1115, 1145 (5th Cir. 1982) ("Reparative injunctive relief must be targeted at elimination of the unconstitutional conditions . . . Therefore, a court can order only relief sufficient to correct the violation found"), vac'd in part on other grounds, 688 F.2d 266 (1982), cert. denied., 460 U.S. 1042 (1983); Toussaint v. McCarthy, 801 F.2d 1080, 1087 (9th Cir. 1986) ("our goal is to cure only constitutional violations"), cert. denied, 481 U.S. 1069 (1987).

This Court has held that in a prison setting the remedy must be tailored to specific constitutional violations. See Lewis v. [Casey, 116 S. Ct. 2174, 2183 (1996) ("[t]he remedy [imposed] must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established."). Id.

The PLRA codifies the standards governing the imposition of injunctive relief by requiring express findings in accordance with

those standards.[4] The PLRA in no way prevents an inmate from asserting a constitutional violation. Nor does it deprive a court from hearing such a claim or affording an appropriate remedy for any proven violation. In fact, the PLRA expressly requires that prospective relief be continued if it "remains necessary to correct a current or ongoing violation of the Federal right . . . " and is narrowly drawn to remedy that violation. 18 U.S.C. § 3626(b)(3).[5]

3. The Termination of Relief Provision Does Not Prescribe a Rule of Decision.

Finally, the petitioners contend that the PLRA impermissibly prescribes unreasonable outcome-determinative requirements for prison cases without changing the underlying law, relying on United States v. Klein, 80 U.S. 128, 146 (1871) for support.

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[4]The imposition of such a procedural mechanism is clearly within Congress's power to designate alternative mechanisms for the remediation of constitutional violations. Cf. Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1132-1134 (1996) (Ex parte Young nonstatutory review precluded where Congress established a statutory scheme for review under the Indian Gaming Regulatory Act).

[5] The statute was recently amended to read "current and ongoing violation." Department of Justice Appropriations Act, 1998, Pub. L. No. 105-119, §123 (a)(2), 111 Stat. 2440, 2470 (1997).

"Klein has been interpreted to hold that Congress may not prescribe a rule of decision for the courts to follow without any independent exercise of their judicial powers." Benjamin v. Jacobson, 935 F. Supp. 332, 349 (S.D.N.Y. 1996). Rather, "[t]o affect the outcome of a pending case, Congress must amend the applicable law." Id.; Plaut, 115 S.Ct. at 1452 (citation omitted) ("Whatever the precise scope of Klein, . . . later decisions have made clear that its prohibition does not take hold when Congress amend[s] applicable law"); see also Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 441 (1992) (declining to decide whether an act of Congress was unconstitutional under Klein because the act amended applicable law).

Here, contrary to petitioners' contention, Congress has merely articulated new remedial standards; it has not imposed an arbitrary outcome or "rule of decision" for the application of pre-existing law. As the Fourth Circuit explained, "Congress . . . has unquestionably amended the law applicable to this case." Plyler v. Moore, 100 F.3d 365, 372 (4th Cir. 1996). Since the PLRA "compel[s] changes in law, not findings or results under old law,"

Seattle Audubon, 503 U.S. at 438, it does not violate the separation-of-powers principles established in Klein.

B. The Application of the PLRA's Termination of Relief Provision Does Not Implicate the Due Process Clause By Impairing Any Existing Contract.

The petitioners contend that the PLRA's termination provision would unconstitutionally impair their "contract" with the defendants. No such contract exists. The Court's inherent power to modify or alter a consent decree makes a consent decree fundamentally different from a private contract.

Even if the Consent Decree could be equated with a private contract, the petitioners argument would still fail. A claim that federal legislation impairs existing contracts falls under the due process clause of the Fifth Amendment. Pension Benefit Guaranty Corp. v. R. A. Gray Co., 467 U.S. 717, 733 (1984). "The Fifth Amendment is not a complete bar to legislation that may impair private contracts." James v. Lash, 965 F. Supp.1190 (N.D. Ind., May 15, 1997). The challenging party must demonstrate, "first, that the statute alters contractual rights," and if so, that the impairment is of "constitutional dimension."

National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe R.R. Co., 470 U.S. 451, 472 (1985). The challenging party must then "overcome a presumption of constitutionality and 'establish that the legislature has acted in an arbitrary and irrational way.'" Id., quoting Pension Benefit Guaranty Corp., 467 U.S. at 729. However, "where a private contract is impaired by a federal statute, judicial scrutiny is 'quite minimal.'" James v. Lash, 965 F. Supp. 1190 (N.D. Ind., May 15, 1997), quoting National R.R. Passenger Corp., 470 U.S. at 472.

The Sheriff is required to provide constitutional conditions at the Nashua Street Jail. This obligation is independent of any Consent Decree. Accordingly, because the petitioners always possess the right to seek a remedy for any unconstitutional condition, any alleged contractual impairment of their rights under the Consent Decree could never rise to the level "of constitutional dimension." National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe R.R. Co., 470 U.S. 451, 472 (1985); see also James v. Lash, 965 F. Supp.1190 (N.D. Ind., 1997).

Conclusion

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 97-1278

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

INMATES OF THE SUFFOLK COUNTY JAIL et al.,

Petitioners,

vs.

RICHARD ROUSE, SHERIFF OF SUFFOLK COUNTY et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONERS

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May 27, 1998

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REPLY BRIEF FOR PETITIONERS

The bulk of the opposition of the Solicitor General is devoted to defending the judgment below if review is granted. For the reasons set forth in the petition and in the opinion of the Ninth Circuit in Taylor v. United States, Nos. 97-16069; 97-16071, 1998 WL 214578 (May 4, 1998), we respectfully disagree. But more fundamentally, the Court need only decide at this time whether it should review the decision below, not how it should resolve the case if review is granted.

In response to the statutory issue raised in this petition, the Solicitor General argues that, because of a recent amendment, the question is of no continuing importance (Opp. at 7). In our view, the amendment only sharpens the need for review. It is significant primarily because it raises the barrier even higher to any plaintiff who seeks to maintain an existing decree because, in effect, it directs the courts to revoke the decree unless the plaintiff can show that there is an existing violation of the decree, no matter how likely it is that once the judicial finger is taken from the dike, the constitutional violations will pour through once again. It is not an answer, as the Solicitor General suggests, (id.), that plaintiffs "are free to seek [new] relief" by filing a new lawsuit after a decree has been terminated. After all, the whole purpose of having a decree is that violations are subject to the power of contempt and need not be the subject of an entirely new lawsuit. Yet under the amended statute, persons such as petitioners will lose the benefit of the consent judgment and the bargained-for rights contained in it, so long as the defendant is not then in violation of the decree. Whatever the 1997 amendment may do to the

statutory issue, it greatly increases the constitutional problems, as the Government itself recognized in its brief in the court of appeals in this very case (Pet. 16).[1/]

The Solicitor General offers two reasons for denying the petition on the constitutional issue, neither of which suffices. First, he notes that the Court has previously denied review on the issue of the constitutionality of the Prison Litigation Reform Act ("PLRA") in Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996), cert. denied, 117 S. Ct. 2460 (1997), but fails to note that

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[1/] According to the legislative history cited by the Solicitor General, the amendment was specifically aimed at the statutory gloss advanced by the United States in the courts of appeals which, the Government then argued, was necessary to avoid "the serious question whether Congress may limit the court's remedial authority to effectively redress constitutional violation." (Brief for the United States as Intervenor at 16). Compare the precise argument made by the United States below with the language of the House Conference Report quoted by the Solicitor General in his Opposition. See Brief for the United States as Intervenor at 16 ("§3626(b)(3) should not be read to require a court to terminate relief . . . where the court finds that the defendant is poised to resume its unconstitutional conduct.") (emphasis added) and H.R. Conf. Rep. No. 405, 105 Cong., 1st Sess. 133 (1997) (prospective relief should not continue even if "government officials are 'poised' to resume a prior violation of federal rights") (emphasis added), quoted at Opp. at 7.

Plyler was the first court of appeals to consider the issue, and now six other courts have spoken, including the Second Circuit which reheard Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997), in early March, and the Ninth Circuit which recently ruled in Taylor that the PLRA was unconstitutional. The denial of review in Plyler represents nothing more than this Court's traditional reluctance to decide major constitutional questions until they have been considered by several courts of appeals.

Second, the Solicitor General suggests that the present conflict may not last because rehearing en banc will be sought in the Ninth Circuit and "there is a reasonable possibility that the Ninth Circuit will grant en banc review in Taylor and eliminate the conflict in the circuits . . ." (Opp. at 12). Aside from the fact that there is nothing but speculation to support such a "possibility," and that there is at least an equal "possibility" that the en banc Second Circuit will find the PLRA unconstitutional, the Solicitor General's position should be rejected for another reason: it dooms the district and appeals court judges in the remaining five circuits -- the Third, Fifth, Seventh, Tenth and District of Columbia -- to devote countless hours to these difficult issues, which will inevitably be fully litigated in each circuit. It will also require eleven judges of the Ninth Circuit to sit en banc, and it will require the Second Circuit to continue its deliberations and opinion writing in the case now pending sub judice.

In sum, the time has come for this Court to accept review and decide what

everyone recognizes is a vital constitutional question: are there any constitutional limits to Congressional power to reopen equitable judgments, and if so, did the PLRA exceed them? There has been more than enough litigation on this issue. No useful purpose would be served by mandating that the lower courts continue to pass on this question, and many additional burdens would be imposed on federal judges and the parties if review is postponed to another day. Only this Court can finally resolve the constitutional question, and it should do so now in this case.

Conclusion

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

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